

**THE HANDLING OF THE OFFENDER  
WITHIN THE ISLAMIC PENAL SYSTEM**

**by**

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**submitted in fulfilment of the  
requirements for the degree of**

**MASTER OF ARTS**

**in the subject of**

**PENOLOGY**

**at the**

**UNIVERSITY OF SOUTH AFRICA**

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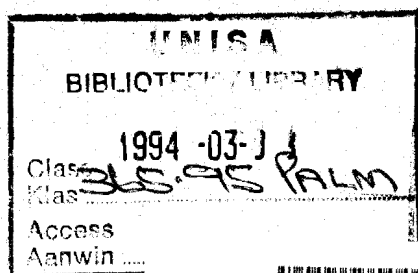
**PROF D P VAN DER MERWE**

**JUNE 1993**

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## DECLARATION

I, ESHAAM PALMER, declare that "THE HANDLING OF THE OFFENDER WITHIN THE ISLAMIC PENAL SYSTEM" is my own work and that all the sources that I have used or quoted have been indicated and acknowledged by means of complete references.



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## SUMMARY

TITLE: THE HANDLING OF THE OFFENDER WITHIN  
THE ISLAMIC PENAL SYSTEM  
BY: ESHAAM PALMER  
DEGREE: MASTER OF ARTS  
SUBJECT: PENOLOGY  
SUPERVISOR: PROF C H CILLIERS  
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This study researches the Islamic Penal System within a penological perspective. The philosophy underlying this Penal System is that every person is responsible and thus punishable for his criminal actions. Punishment could also await the offender in the Hereafter.

A system of penalties and rewards is the cornerstone of the Islamic Penal System. The types of punishment that are allowed by the *Shari'ah* are, *inter alia*: the death penalty, lashes, banishment, imprisonment, crucifixion, lapidation and public exposure.

There are three categories of punishment: *Hadd* punishment is reserved for serious offences and cannot be altered in any way whatsoever, *Qisas* punishment is reserved for homicide and assault, whilst *Ta'zeer* penalties cover the balance.

Since this Penal System can only operate within a true Islamic State, it currently only operates fully in Iran and Saudi Arabia. Numerous other Muslim countries apply this system to a lesser degree, for example, Sudan and Afghanistan.

## ACKNOWLEDGEMENTS

I gratefully acknowledge my indebtedness to all those who either directly or indirectly contributed to the fruition of this dissertation.

My sincere and heartfelt gratitude to Professor C H Cilliers who conducted long-distance supervision, and whose enquiring mind elicited many thought provoking ideas. Also Professor D P Van der Merwe who agreed to act as joint supervisor.

The Islamic Library in Gatesville, the South African Library and the UNISA library, whose books and other literature helped immeasurably in my research and the University of South Africa for conferring this degree.

My wife Ahysa, sons Chirvan and Nizam, daughter Tasmia and my parents Yusuf and Nafiesa whose patience and support have helped to bring this research to fulfilment. Sheikh A K Toffar for his advice and guidance in matters pertaining to the *Shari'ah*.

And last, but not least, the Almighty, Whose will and guidance made this work possible.



## NOTES ON ISLAM

Islam is one of the three major world religions and was propagated by the Prophet Muhammad in the 7th Century A.D. The adherents of Islam are called Muslims and are to be found all over the world. In its broad context Islam means "surrender to the will of Allah".

This religion's central theme is that there is one supreme God called Allah and that Prophet Muhammad is His Messenger. The Quran is the Holy Book of the Muslims and was revealed to the Prophet over a period of time. There are five fundamental principles in Islam, namely, belief that there is no God but Allah and that Muhammad is His Messenger; performing five daily prayers; fasting the month of *Ramadaan*; giving alms to the poor and needy; and performing a pilgrimage to Mecca when at the means to do so.

The body of Islamic Law (the *Shari'ah*), forms an integral part of the religion of Islam. However, very few countries with a Muslim government apply the *Shari'ah* to any significant degree, exceptions are Iran, Saudi Arabia, Sudan, Pakistan, Kuwait, and Northern Nigeria. This is especially so with regard to Islamic Penal Law.

One of the major reasons for the Islamic Penal System not being applied in other countries where Muslims constitute a majority of the population, is because it can only be applied in a true and complete Islamic State.

According to the 1991 Yearbook of the United Nations, Islam having 1 200 000 adherents, is the fastest growing religion in the world. Since 1934 its followers have increased by about 500%. Muslims are to be found in 102 countries the world over and constitute the majority of the population in 51 of them. The countries where Muslims occur in large numbers but where they do not constitute a majority are China (35 m) and India (120 m). Muslims constitute a majority in: Egypt (52 m), Indonesia

(159 m), Nigeria (70 m), Pakistan (112 m) and Turkey (65 m).

Muslim countries also produce large quantities of the world's strategic raw materials, like oil (66%), rubber (70%), jute (67%), palm oil (66%), phosphates (55%) and tin (40%). They also produce significant quantities of the world's coffee, tea, wood, uranium, manganese and cobalt. (South, 26/2/92).

Since the Islamic revolution in Iran, Islamic Fundamentalism has spread rapidly in the Muslim world, especially in Africa and the Middle East. The movement is especially strong in Algeria, Sudan, Morocco, Tunisia, Egypt, Yemen, Jordan and Lebanon (South, 29/1/92). However, Pearl (1979:201) is of the view that this move toward Islamic Fundamentalism is a world-wide phenomenon which is taking place in virtually every Muslim country.

From a layman's perspective Islamic Fundamentalism can be defined as a move toward practising and implementing the fundamental principles of Islam, including the Penal System of the *Shari'ah*. One of the main reasons for the Fundamentalist resurgence in Muslim countries was as a reaction against the encroachment of Western practices and ideas.

Schacht (1974:392) states that the *Shari'ah* is one of the major contributions made to the civilised world by Islam, although it is a system, which is totally different to any other legal system either before or after it. Being a Muslim means believing and practising the teachings of Islam as it is contained in the *Quran* and *Sunnah* (Fyzee, 1974:60).

Readers will note that the terms Muslim and Islam are used interchangeably, depending on the grammatical context. Terms signifying the male gender include the female, unless the contrary is expressly stated.

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# CHAPTER 1 : THE RESEARCH PROJECT

## 1.1 INTRODUCTION

As the title denotes, this dissertation attempts to examine the handling of the offender within the Islamic Penal System. As it is practically impossible to deal fully with this multi-faceted phenomenon in a project of this nature, specific aspects have been covered.

Essentially it therefore assumes the form of a theoretical, fundamental study, impossible to undertake without a delimitation being made. The delimitation resulted in the contents of the research being presented in nine chapters. The ordering of the chapters is designed so as to promote the unfolding of the research in a logical sequence.

In chapter one, the methodological accent is provided and much basic issues as what is to be researched, the desirability of such research and how the research is undertaken, and dealt with. This chapter also reveals the foundation upon which the research is based.

Chapter two discusses the concept of the ideology of Islam and the various sources of Islamic Penal Law. An overview of the judicial and legal system is presented as well as the penal objectives of this system. The causes of crime and the definitions of crime and punishment are also addressed.

In chapter three the concept of punishment and its underlying philosophy as it is practised within the Islamic Penal System is generally discussed. The various forms of punishment that can be imposed are also analysed and discussed. In chapter four the individual types of punishment that can be imposed in terms of the Islamic Penal System are discussed. Chapters five and six discusses the implementation of Prescribed Punishment (*Hudood*).

Chapter seven contains a study of Equality of Punishment (Qisas), whilst chapter eight discusses Discretionary Punishment (Ta'zeer). Chapter nine contains an exposition of the implementation of the Islamic Penal System in a number of Muslim countries, whilst chapter ten contains the conclusion. The study also contains a Glossary of Arabic Terms and a Bibliography.

According to the Shari'ah (body of Islamic Law) the Islamic State is an indistinguishable combination of religion, economics, law and politics, where sovereignty is vested in Allah (Mohamed, 1926:14).

In chapter three it will be seen that the economic and political systems of the Shari'ah play an important role in the Penal System. The Islamic Penal System cannot be fully operational unless it exists in a milieu composed of the rest the elements of the Shari'ah. This concept differs significantly from the Western concept of the penal system since the latter is divorced from religion although it is affected by politics and economics.

However, legislative sovereignty was vested in the people, thus allowing the passing of legislation to cater for offences which the original and primary sources of Islamic Law did not make provision for (Mohamed, 1926:23). The Dar-ul-kuza and Ifta (the judicial departments of the Islamic State) were part of the Islamic Penal System since the advent of Islam (Mohamed, 1923:36).

The judicial system plays an integral part in the Shari'ah and was established contemporaneously with the Islamic State. It enforces not only legal norms but also upholds religious, ethical and moral values. Thus the Islamic Penal System cannot be viewed in isolation of the Shari'ah or the religion of Islam as it constitutes an inextricable component of this multifarious system.

A further fundamental distinction is that although all laws are

focused on improving the social life of people, the *Shari'ah* also aims at promoting the welfare of its followers in the Hereafter (Mohamed, 1923:27). It also considers the last-mentioned aim to be a more important one since life in the Hereafter is eternal.

The Islamic Penal System is not contained in one single document or piece of legislation, nor was it introduced at one specific historic juncture. The *Shari'ah* within which the Islamic Penal System is contained, was introduced piece-meal, over a long period of time.

Since the *Quran* is the basic and primary source of the Islamic Penal System, it cannot be overruled by any other source. The second primary source, namely the *Sunnah* or rulings of the Prophet also cannot overrule injunctions contained in the *Quran*, although it can explain or expand on *Quranic* laws. This is evident with offences like adultery and drinking wine.

*Quranic* injunctions are explained by the Prophet in his rulings. After the death of the Prophet, leadership of the Islamic State devolved on his four companions in the following order: Abu Bakr, Omar, Uthmaan and Ali. They were the first *Caliphs* of Islam and in turn applied the numerous rulings of the Prophet. It was also their duty, as in the case of other Islamic Rulers, to implement the Islamic Penal System.

During the period of the establishment of the Schools of Jurisprudence there were important developments in Islamic Penal Law and other branches of the *Shari'ah* as a result of *Ijmaa* (consensus) and *Qiyas* (analogy), both being important sources of law. During this period the four main *Sunni* Schools of Jurisprudence were founded, namely, Hanafi, Maliki, Shafi'i and Hanbali, with the first-mentioned School having the most adherents and the last-mentioned School having the least. When Abu Yusuf of the Hanafi School was appointed Chief *Qadhi* (Islamic Judge), the Hanafi doctrine was enforced by State decree in the Islamic State.

These Schools only interpret Islamic Penal Law and the writings that flowed from its major proponents and recorded the relevant laws in a systematic and coherent way. Muslims are free to follow any of the interpretations of these Schools and there is no compunction on those within a specific geographical area where the view of a specific School prevails, to adhere to it.

When discussing the Islamic Penal System in this study, frequent reference will be made to the interpretations offered by these Schools of Jurisprudence in cases where the *Quran* or *Sunnah* are silent on a specific aspect.

This research project also considers the relationship between religiosity and punishment and its effect on crime prevention in the Islamic experience.

### **1.2 CHOICE OF SUBJECT MATTER**

There are a number of considerations which influence the choice of any research project. The following three have pertinently influenced this study:

- necessity and desirability of choice;
- availability of data; and
- involvement of the researcher.

#### **1.2.1 NECESSITY AND DESIRABILITY OF CHOICE**

The rates of crime in countries where the Islamic Penal System prevails are lower than those in Western countries, and, in South Africa in particular (Doi, 1984:219 & 220). The Islamic Penal System contains, what is perceived to be "barbaric" penalties, for example, lapidation and dismemberment, whilst Western countries are constantly reforming their criminal penalties to be more "humane", like probation, correctional supervision and the suspension of prison sentences and fines. The socio-political situation has no doubt promoted the degree of lawlessness



resulting in an increase in criminal activity in most Western countries, as has the constant lowering of moral standards.

To date no extensive research has been undertaken in South Africa concerning the Islamic Penal System and the practical implementation of that system in Muslim countries.

Research is required to determine whether the "harsh" penalties prescribed in terms of the Islamic Penal System or the "humane" penalties of countries where Islamic law does not prevail, has any influence on the rates of crime in the respective countries. Research on this topic will no doubt go a long way in reducing the shortage of projects in comparative penology in our libraries.

A comparative study of Penal Systems not only enriches our understanding of the problem of crime and punishment but also assists one in formulating suitable and appropriate penalties in order to give impetus to the crime prevention process. It is only through learning from the experiences of others that one can avoid the pitfalls of a process of trial and error. Comparative studies also broaden the vision and perspectives pertaining to this specific scientific field.

#### 1.2.2 AVAILABILITY OF DATA

Data on the Islamic Penal System are to be found mainly in the Quran; compilations of the rulings of the Prophet; text books; journals relating to law, criminology and penology; judicial decisions; empirical and other research projects; Penal Codes of Muslim countries; Acts of Parliament and other legislative organs; commissions of enquiry; Government Department annual reports; and articles in newspapers and periodicals.

### 1.2.3 THE INVOLVEMENT OF THE WRITER

Having gained first-hand experience of the practical functioning of the legal systems of Saudi Arabia, Great Britain, and the United States of America, by studying and undertaking research within those countries and by being employed as a magistrate, public prosecutor, mediator, attorney, assessor in the Supreme and Regional Courts and lecturer in law subjects in South Africa, the interest and involvement of the writer is self-evident.

It is an enlightening and worthwhile experience to compare the penal systems of the East and West, so vastly different in nature although so similar in their aims and objectives.

Not only has there been a dearth of research conducted locally on the Islamic Penal System, very little comparative research has been conducted on the topic of penal systems in South Africa generally.

### 1.3 OBJECTIVES OF THE RESEARCH PROJECT

The primary objectives underlying penological investigation in general are, *inter alia*, knowledge of and insight into the punishment phenomenon with a view to the application of such acquired knowledge. In the instant project the first objective was the acquisition of scientific knowledge, that is information transferred into science through acceptable collation and systematisation to form a meaningful whole within the confines of the predetermined delimitation.

As indicated above, a penological perspective was sought to the problems associated with crimes and punishment once they have been identified. This interpretation phase constituted the second objective.

Thirdly, in posing solutions to the said problems, it was

envisaged that a contribution would be made to the body of existing penological knowledge which may, for example, be implemented by the criminal justice practitioner. Any such contribution would hopefully stimulate interested persons and/ or bodies to perpetuate the process by further research, comment and similar endeavours.

### **1.4 METHOD AND TECHNIQUE**

The nature of the subject dictates that the most appropriate source of information is a documentary one. This choice of data collection is supported by the supervisors. As stated above, documentary study may involve a wide range of documentation like text books, newspapers, reports, articles in periodicals and parliamentary reports. Such documentation may serve as an aid to assimilate knowledge and to verify the acquired knowledge.

A Bibliography at the end of the study (p.211) reveals the documentary sources utilised in this project as well as the Supreme Court cases cited herein. Necessity dictates that a Glossary of Arabic Terms appear in the study as well (p.225).

The various limitations that are unique to documentary sources were considered during the compilation of this study, for example, whilst secondary sources must be viewed with caution, primary sources must be checked and evaluated to ascertain whether they are reliable, relevant and significant. A factor which gave great credibility to the sources was the primary source of Islamic Penal Law, namely the *Quran*, which has remained unchanged since it was first recorded. This is also true to a lesser degree of the rulings of the Prophet. The writings on the secondary sources of Islamic Penal Law, namely, *Ijmaa* and *Qiyas*, have also not been radically changed over the years.

Furthermore, the documents containing both the primary and secondary sources have been committed to memory by numerous

persons to ensure that the contents are not changed as later editions are published.

The danger of wrong interpretation of the documentary sources has been minimised by the fact that the contents of the *Quran* have been interpreted by reputable Islamic jurists, for example, Abu-Ja'far Muhammad ibn-Jarir al-Tabari (838 - 923 AD), who has written commentaries on the *Quran* which have been followed over the ages as the correct interpretation thereof (Hitti, 1986:390).

### 1.5 DELIMITATION

It is acknowledged by the researcher that it is almost impossible to include all the data on the Islamic Penal System and thus specific parameters were fixed for the research.

The first limitation was the implementation of the Penal Law of the four main *Sunni* Schools of Jurisprudence, namely, Hanafi, Maliki, Shafi'i and Hanbali, as opposed to including the interpretation of the numerous other Schools. This study does not allow the inclusion of the complete *Shi'ite* doctrine.

This study will also be geographically limited in that the Penal Systems of the Islamic States of Saudi Arabia, Iran, Somalia, Sudan, Pakistan, Egypt, Libya, Yemen, Nigeria, United Arab Emirates, Syria, Jordan, Bahrain, Afghanistan, Turkey, Malaysia and Indonesia, will be discussed.

Types of crimes and punishment referred to in this study will be mainly those contained in the primary sources of Islamic Penal Law, as a study of the crimes and punishment of all those created by the legislatures of the various Muslim countries would be an insurmountable task.

Lastly, only the laws within the *Shari'ah* relating to criminal matters, and not personal law issues, will be addressed.

**1.6 PROBLEMS AND DEFICIENCIES**

This sphere of study has not been extensively researched before in South Africa and the danger exists when new ground is broken, that a researcher may become easily side-tracked, digress or accord undue emphasis on peripheral issues. However, the researcher has at all times endeavoured to remain within the predetermined parameters throughout the research; despite the many avenues that presented themselves for exploration.

## CHAPTER 2 : ISLAM AS AN IDEOLOGY AND A WAY OF LIFE

### 2.1 INTRODUCTION

Islam is not a religion in the conventional sense, since its body of laws (*Shari'ah*) provides for both a legal and judicial system. The sources of Islamic Law are very static and the only way in which new legislation can be enacted in the modern day is by drawing analogies based on the primary sources of Islamic Law.

The *Shari'ah* is also interpreted within one of the four major *Sunni* schools of jurisprudence, unless there are provisions in the primary sources which are unambiguous and forthright.

Causes of crime and the criminal responsibility of offenders in terms of the *Shari'ah*, is also dealt with. This chapter will examine the all-encompassing nature of the *Shari'ah* and the numerous ways in which it governs the daily lives of its adherents. The *Shari'ah's* pluralistic nature is examined with specific reference to interpretation of the laws contained within the Penal System and how these affect the nature and form of the judicial system prevalent in the Islamic State.

A different emphasis is placed on the traditional penal objectives by the *Shari'ah*, whilst the causes of crime are examined in the context of the Islamic Penal System. Finally this chapter will analyse the definitions of crime and punishment and the criminal liability of offenders in terms of the *Shari'ah*.

### 2.2 THE LEGAL PARAMETERS OF THE SHARI'AH

Islamic Law originated with the creation of the first human being, namely Adam, who is considered to be the first Prophet of Allah (Islahi, 1979:2). The *Shari'ah* was necessary at this stage since without it man could not attain salvation in his life on Earth or in the Hereafter (Islahi, 1979:3).

Thus the *Shari'ah* and man-made law have two fundamental differences. Firstly, Islamic Law is a product of divine creation, whilst man-made law is created by human effort. Secondly, the *Shari'ah* governs the life of man from birth to the Hereafter, whilst man-made laws are promulgated periodically to deal with the social and political situations prevalent at that time (Shaheed, 1987:15 - 23).

Islam claims to be the final revelation after Judaism and Christianity. Many forms of punishment found in the Islamic Penal System originated in the Torah and the Old Testament. However, according to Rahman (1979:110), Islam is more than just a religion, it is a way of life, which entails a legal-, social-, political- and economic system. Every aspect of a Muslim's life from birth to death and even existence in the Hereafter is governed by this system.

It is a practical way of life which attempts to address the needs of humanity by, *inter alia*, forbidding the individual's transgressing the rights of others and more especially the rights of society, and accepts economic factors as being but one of the aspects which dominate human existence, but disagrees with the Marxist theory that economics lies at the root of crime (Qutb, 1977:20 - 24).

Schacht (1986:1) has this to say about the body of Islamic law: "The sacred law of Islam is an all-embracing body of religious duties, the totality of Allah's commands that regulate the life of every Muslim in all its aspects; it comprises on equal footing ordinances regarding worship and ritual, as well as political and (in the narrow sense) legal rules."

Islam can therefore be distinguished from religions like Christianity, Judaism and Buddhism in that it deals with more than just the spiritual well-being of individuals - it governs all the practical aspects of life as well.

### 2.3 SOURCES OF ISLAMIC PENAL LAW

The sources of Islamic Penal Law are the *Quran* and *Sunnah* (rulings of the Prophet), which are the primary sources and *Ijmaa* (consensus) and *Qiyas* (analogy), the secondary sources (Islahi, 1979:27 - 29). According to Karl (1991:137), *Ijmaa* and *Qiyas* are not sources in the strict sense, but ways of discovering the ambit and expression of the law. Furthermore, it is a way of balancing traditional rules of conduct against latter day needs (Karl, 1991:142).

#### 2.3.1 THE *QURAN*

There is no doubt that the *Quran* is the basic and supreme source of Islamic Penal Law, and as such, has no equal, although it is not the sole source. Laws contained in the *Quran* cannot be overruled by any other form of law in the *Shari'ah*.

The *Quran* contains laws which are applicable in this world and in the Hereafter. There are basically two species of laws found in the *Quran*, laws relating to religious beliefs and those laws concerning worldly affairs, like personal and criminal matters (Shaheed, 1987:195). It is the latter species of law that this study will contend with.

Two forms of punishment are also prescribed in the *Quran* for each contravention of a *Quranic* law, one to be meted out in this world and the other in the Hereafter. Prescribed or *Hadd* offences have its origin in the *Quran*.

Thus if an offender escapes punishment in this world due to the crime going undetected or if he is acquitted in court on the basis of a technicality, punishment in the Hereafter still awaits him. Allah has a discretion whether or not to impose punishment in the Hereafter for those who escaped punishment in the mundane world, as well as those who were punished.



Penal Laws in the *Quran* are aimed at regulating the social and cultural life of man (Maududi, 1980:263).

#### 2.3.2 THE *SUNNAH*

The *Sunnah* can be defined as the rulings, practices and approbation (referred to as *Hadeeth*) of the Prophet as recorded by various persons (Shaheed, 1987:205). These *Ahadith* (plural of *Hadeeth*) are the statements or orders of the Prophet. The *Quran* (*Surah* 4:Verse 59) itself states that the *Sunnah* is also a source of Islamic Law: "O! Ye who believe! Obey Allah and obey the Messenger and those of you in authority, and if ye have a dispute concerning any matter refer it to Allah and the Messenger".

There is unanimity amongst all the important Islamic jurists, for example, Imams Abu Haneefa and Shafi'i, that the *Sunnah* is the key to understanding and interpreting the *Quran* (Shabbir, 1982:88). If one were to simplify the distinction between the *Quran* and *Sunnah*, then the former depicts the words of Allah, whilst the latter are the instructions of Allah to the Prophet.

The *Sunnah*, which is second only to the *Quran* as a source of Islamic Law is also closely linked to the *Quran* as a legislative tool: it can actually stress or support a *Quranic* injunction; in certain instances it explains or interprets it; whilst in other instances it specifies rules emanating from it (Shaheed, 1987:206 & 207).

This form of law plays an important role in the Islamic Penal System since it describes numerous offences not mentioned in the *Quran*, as well as identifying the form of punishment to be imposed where the *Quran* has remained silent on this aspect. The four *Caliphs* and the *Sunni* Schools of Jurisprudence also rely heavily on this form of legislation in their formulation of Penal Laws.

2.3.3 IJMAA (CONSENSUS)

*Ijmaa* entails the consensus of juristic opinion of all the *mujtahidoon* (persons entitled to interpret the *Quran*). When the jurists of an era agree on a specific position *Ijmaa* will have been proved. Both the *Quran* and *Sunnah* sanction *Ijmaa* as a source of law (Khan, 1978:27).

This source of law lays the basis for the passing of legislation, sanctioned by the Head of State, to make provision for the imposition of punishment for criminal offences not mentioned in the *Quran* or *Sunnah*. According to Shaheed (1987:215 - 217), this power extends to pardoning offenders and reducing certain penalties.

Both the *Quran* and *Sunnah* are limited as a source of Penal Law and therefore they provide a foundation for future criminalisation of anti-social acts. The four *Caliphs* and the *Sunni* Schools of Jurisprudence play an important role in this regard.

2.3.4 QIYAS (ANALOGY)

*Qiyas* or analogy is the fourth source of Islamic Law. If a certain matter is not covered by the *Quran*, *Sunnah* or *Ijmaa* the law may then be deduced from these sources (Khan, 1978:30). Very strict rules apply to the formulation of this form of legislation and only the views of renowned jurists are considered. Many penalties have been established from analogous sources, for example, consuming wine.

2.4 BACKGROUND TO THE ISLAMIC LEGAL SYSTEM

It was stated by Shad (1986:256) that the judiciary is the backbone of the Islamic State and the Islamic Legal System has a duty to treat all persons alike, be they Muslim or non-Muslim.

From the earliest days of Islam, since before the death of the Prophet, the legal system was administered by the Judicial Department of the Islamic State (Jung, 1926:22). The Prophet was also a *Qadhi* during his lifetime and served in the *Shari'ah* court system.

It is not just the duty of the administration of justice to see that justice prevails, but the duty of all departments of state. Judges are appointed by the Head of State who will lay down the parameters of his jurisdiction and tenure of office (which is not dependent on the tenure of the Head of State) (Jung, 1926:36). The Islamic legal system is governed by a code of law and a code of morality, outlawing acts which are either illegal or immoral (Moosagie, 1989:12). Thus this legal system has wider parameters of operation, in that it concerns itself with immoral and irreligious acts as well.

When called upon to do so, witnesses are obliged to give evidence on events that they are aware of (Jung, 1926:40). It was actually the principle of *Ijtihad* that allowed the law to develop a comprehensive system of justice which keeps pace with changing times.

The *Shari'ah* is traditionally interpreted within one of the four main *Sunni* Schools of Law. It is thus necessary for a brief background to the four *Sunni* Schools of Jurisprudence, since numerous Islamic Penal Laws are interpreted in different ways by these Schools. There are also instances where different forms of punishment are prescribed for the same offence.

This does not mean that there are fundamental differences within the Islamic Penal System, only that different interpretations are permitted. It will be noted in the following section that the various countries or geographical areas subscribe to the interpretation of a specific School; this choice usually coincides with the cultural and historical factors germane to these areas. However, *Qadhis* are free to adopt the

interpretations of any of the Schools of Jurisprudence. When a *Quranic* law is clear and unambiguous, expression must be given to its intent and no recourse can be had to juristic interpretations.

The four main *Sunni* Schools will only be dealt with very briefly since an extensive presentation falls outside the ambit of this research project.

#### 2.4.1 HANAFI SCHOOL OF JURISPRUDENCE

Imam Abu Haneefa, the founder of this School was born in 699 AD at Kufa, during the rule of the Umayyads and was an expert in the art of *Qiyas*. This School is the oldest of the four and he is well known for introducing the principle of "*Istehsan*", namely, the preference of the stronger of more than one legal choice, on the grounds of public policy. Abu Haneefa also made the first attempt to codify Islamic Law and used *Qiyas* as one of his bases. He evolved a theory of law called "*Usul-al-Fiqah*" (science of jurisprudence) for the first time (Ajijola, 1983:30 - 33).

Although this School originated in Iraq, it is officially applied by the *Shari'ah* courts as far away as Tunisia, and is followed by most Muslims in Afghanistan, India, Pakistan, Bangladesh, Sudan, Israel, Egypt and Libya (Ajijola, 1983:30 - 34).

This School has by far the most adherents world-wide (at least a third of the world's Muslim population), whilst all the other jurists that succeeded him studied his works before and after his death (Safwat, 1982:150). His interpretations of the *Shari'ah* take on a more liberal tone.

#### 2.4.2 MALIKI SCHOOL OF JURISPRUDENCE

Imam Malik was born in Medina in 713 AD, thirteen years after Imam Abu Haneefa. His famous work *Al-Muwatta* was the first

authentic work on the rulings of the Prophet and is the most famous of his collection of eleven books. All his legal theories were based on rulings of the Prophet. Imam Shafi'i rated *Al-Muwatta* as the most authentic book on Islamic jurisprudence after the *Quran* (Doi, 1984:100 - 102).

According to Ajijola (1983:35 & 36), followers of this School are to be found mainly on the North African coast, Central Africa, the Arabian Gulf and West Africa.

#### 2.4.3 SHAFI'I SCHOOL OF JURISPRUDENCE

Imam Shafi'i was born in 767 AD and was a descendent of the Prophet (Doi, 1984:103). At seven years he had committed the contents of the *Quran* to memory and did the same to the *Muwatta* at 10 years. Imam Shafi'i was the first jurist to formulate Islamic jurisprudence into a regular legal system. At the age of fifteen he was granted the status of a jurist (Ajijola, 1983 :37)

Although he was a student of Imam Malik, he also studied the doctrines of Imam Abu Haneefa when he lived in Baghdad (Doi, 1984:104 - 106). His greatest contribution was in the field of Islamic jurisprudence, where he systematically defined the sources and scope of Islamic Law. Imam Shafi'i is credited with developing the science of *Qiyas* (Rahman, 1979:72).

Followers of this School are to be found in Egypt, Yemen, Kenya, the Persian Gulf, Sri Lanka, South Africa and Indonesia (Ajijola, 1983:37 & 38). Doi (1984:107) states that he also has followers in Malaysia and Syria.

#### 2.4.4 HANBALI SCHOOL OF JURISPRUDENCE

Imam Hanbal was born in 780 AD and was a student of Imam Shafi'i. He based his legal opinions solely on *Ahadith* (Doi, 1984:108). The followers of this School are to be found mainly in Saudi

Arabia. The interpretations of Hanbali jurists have a stricter and more orthodox approach in interpreting the *Shari'ah*. The Hanbali interpretation of Islamic Law is based strongly on the rulings of the Prophet (Von Grunebaum, 1971:5).

Each of these Schools of Jurisprudence above (Hanbali, Shafi'i, Maliki and Hanafi) developed their own doctrine of public policy, which made the application of Islamic Law accord with the various cultural differences found in the many countries where the specific School of Law prevailed. There are no fundamental differences in the interpretation of Islamic Law amongst these Schools, instead there exists an aura of peaceful co-existence amongst them and each regards the other as a legitimate body attempting to define Allah's commands (Coulson, 1969:22).

As will be seen in chapters five, six, seven and eight, in certain instances different penalties are prescribed for the same offence by the above Schools of Jurisprudence. These four *Sunni* Schools all accept the *Quran* and *Sunnah* as the primary sources of Islamic Law and *Ijmaa* and *Qiyas* as the secondary sources (Doi, 1984:111).

The presence of these four Schools of Jurisprudence facilitates compliance with the *Shari'ah*, since a Muslim is free to follow a specific interpretation that would best suit his requirements and way of life. This is especially important since Muslims are found in all parts of the world, subject to all its cultural diversities.

However, the *Shi'ite* sect has a different concept of the interpretation of the law; the Imam or Muslim leader of the day is the final interpreter of the law (Fyzee, 1974:43 & 44). Most followers of this sect are to be found in Iran and Iraq.

## 2.5 THE ISLAMIC JUDICIAL SYSTEM

Despite the striving for a crime-free society, the criminal law is necessary because of the fickleness of human nature. In terms of the *Shari'ah* the individual's interests are secondary to those of society and therefore the underlying aim of the judicial system is to protect society from wrongful individual and group behaviour. Any crime against the safety and security of society is akin to a crime against Allah Himself (Doi, 1984:219). Unlike the position of any other judicial system in the world, the mere consumption of alcohol or any other intoxicating substance is a serious offence.

A Muslim who takes the law into his own hands by meting out punishment to an offender will himself be dealt with as a wrongdoer - only a *Qadhi* may impose punishment for a crime (Doi, 1984:222). The maximum compensation that can be granted to a victim is equivalent to the damage sustained, whilst victims are encouraged to forgive the offender so that reconciliation could take place - "Nor can goodness and evil be equal. Repel evil with what is better: then will he between whom and thee was hatred become as it were thy friend and intimate." (*Quran, Surah 41:Verse 34*).

Thus Islamic Criminal Law not only seeks to prevent Muslims from committing offences but also that they become accountable for all their misdeeds in the Hereafter, if Allah so wishes. This system differs significantly from those found in Western countries, especially with regard to the actions which are criminalised, for example, the criminal offences of adultery and the charging of interest on loans.

This dualistic role of the Islamic Criminal Justice System impacts on the implementation of its Penal Laws, which have a closer link to religious tenets than to constitutionality. In fact the position of public prosecutor is unknown since the victim or heirs initiate the criminal action. However, in

practice in Muslim States, a government official is appointed to carry out this task.

The judge (*Qadhi*) is appointed by the Islamic Ruler and may not preside over cases in which he has any interest, pecuniary or otherwise. An appeal against the conviction and sentence lies to a committee of men learned in Islamic Law (*Mazalim*) (Schacht, 1986:188). This provides the basis for a system of appeals from the court of first instance. *Qadhis* are also in control of the prison within their jurisdiction and appoints officials to manage this institution. The *Mazalim* is actually a "court of complaints" to which grievances, including those against *Qadhis*, can be referred (Hicks, 1982:6).

In certain criminal cases the parties can instead appoint an arbitrator (*Hakam*) to hear the case. If the arbitrator does not strictly apply Islamic Penal Law, the *Qadhi* can set the conviction and sentence aside and have the case heard *de novo*. Only persons who qualify to be appointed as a *Qadhi*, may act as arbitrators. (Schacht, 1986:188). The absence of an office of the public prosecutor is compensated for by the office of the *Hisba* of the *Muhtasib* (Schacht, 1986:207).

Punishment imposed by a *Hakam* after a process of arbitration usually occurs in cases of minor offences. According to the Hanafi School a *Qadhi* first has to approve the penalty imposed by a *Hakam* before it can be implemented, whereas the remaining three *Sunni* Schools hold the opposite, i.e. the *Hakam's* penalty has the same effect as that imposed by a *Qadhi*. (Sayen, 1987:236). The decision of the *Hakam* is, however, subject to appeal.

## 2.6 ISLAMIC PENAL OBJECTIVES

According to the *Shari'ah*, the main objectives of punishment are to publicly humiliate the offender with the infliction of punishment equivalent to the harm caused so that he, as well as



society, are deterred from committing further offences and in this manner, reform the offender. The finer detail of this objective is spelt out hereunder.

#### 2.6.1 RETRIBUTION

The retributory element of punishment is clearly stated in the Quran (Surah 2:Verse 178) in the following Verse: "O you who believe! Prescribed for you is retribution in the case of the slain." Therefore one of the aims of punishment in terms of the Islamic Penal System is to placate the victim by punishing the offender, merely because he committed the offence. The imposition of punishment becomes a direct reaction to the criminal act. In this process it is envisaged that acts of revenge by family or friends of the victim will be eradicated. (Siddiqi, 1988:25). This system also attempts to appease the victim by giving him the choice in certain instances, to either have punishment imposed on the offender or to demand a financial settlement.

Reciprocity in terms of the *Shari'ah* entails imposing a degree of punishment equivalent to the extent of the harm caused, and no more (Siddiqi, 1988:9 & 10). However, in practice this may be difficult to ascertain, especially with regard to physical injury or *crimen injuria*. Offences like theft and robbery, i.e. crimes which have as component, an element of dishonesty, are ones in which the loss can easily and accurately be determined. To this end the Islamic Penal System stipulates specific monetary values relative to the seriousness of the injury caused.

Rabie & Strauss (1985:19) are of the view that one should not attach too much importance to the criticism that the punishment imposed should be equivalent to the degree of harm caused, since what is really implied is that "there should be an adequate proportion between the punishment and the seriousness or gravity of the crime". Furthermore, it is this element which distinguishes retribution from revenge. The *Shari'ah* recognises

that only Allah can determine the exact degree of harm caused.

This objective contains the element of expiation in terms of which the offender is purged of his guilt as a consequence of the imposition of punishment, being proportionate to the degree of moral blameworthiness with which the crime was committed. The *Shari'ah* supports the Justice Theory whereby the offender is punished to a degree that is equivalent to the harm caused; merely because he committed the offence; and in order to re-establish the balance that was prevalent before the offence was committed.

Retribution is one of the main penal objective of the Islamic Penal System and was a direct consequence of acts of revenge perpetrated on innocent persons in terms of the application of the *Lex Taliones* principle in pre-Islamic days. With the imposition of punishment, the *Shari'ah* wishes to appease the victim, whilst at the same time inflicting on the perpetrator the same degree of harm suffered by the victim. Potential criminals would thus be forewarned that they will suffer the same degree of harm that they inflict on others. This penal motive has its origin in the Torah and was also present in the Old Testament.

#### 2.6.2 DETERRENCE

This is also one of the major penal objectives of the Islamic Penal System. Punishment is imposed to ensure that the criminal does not repeat the crime he committed (Siddiqi, 1988:10). By publicly humiliating the criminal it is intended to deter him and the general public from committing similar offences. For this form of punishment to be effective it must be imposed in public, otherwise the element of humiliation will be absent. Imposing lashes on the offender in public in Muslim countries is a perfect manifestation of the practical application of this penal motive.

The South African Supreme Court has on numerous occasions emphasised the importance of this penal motive: R v Persadh 1944

NPD 357 at 358 and S v Bock 1963 (3) SA 163 (G.W.). According to Gardiner and Lansdown (1917:121) the purpose of individual deterrence is to deter the offender from repeating his offence by teaching him a lesson.

However, the British experience with corporal punishment has indicated that it has limited deterrent effect as a form of punishment (Report on Corporal Punishment, 1938). Likewise the South African experience with whipping has not produced evidence that it has much individual deterrent effect -S v Mkhize 1967 (2) P.H., H. 256 (N).

It should be remembered that whipping or corporal punishment as it is imposed in South Africa differs in an important aspect from the way it is imposed in terms of the Islamic Penal System, in that the element of public humiliation is absent. In terms of *Shari'ah*, whipping occurs in public in order that the criminal may be humiliated and consequently deterred thereby.

In terms of the provisions of the Criminal Procedure Act of 1977, whipping for adults and juveniles is regulated in the following manner: Adults - whipping is imposed at the discretion of the court and may only be imposed in addition to a sentence of imprisonment if such imprisonment is wholly suspended. It may only be inflicted by means of a cane and may not exceed seven in number.

Whipping must be inflicted in private in a prison and may not be imposed more than twice or within a period of three years of the last occasion on which it was imposed. Furthermore, whipping may only be imposed in cases of convictions for one of the following offences or an attempt to commit such offence: robbery, rape, aggravated or indecent assault, breaking and entering premises with the intent to commit an offence, knowingly receiving stolen property, murder where the death sentence is not imposed, arson, malicious damage to property, public violence, sedition or culpable homicide involving an assault.

Juveniles - The ambit for imposing this form of punishment on juveniles is much wider than for adults. Juveniles below the age of twenty one years can have this penalty imposed on them for any offence, *in lieu* of any other punishment. The number of strokes may not exceed seven. Juveniles between the ages of fourteen and twenty one years can be sentenced to whipping in addition to a sentence of imprisonment.

The strokes must be inflicted on the buttocks which must be covered with the normal attire and a parent or guardian may be present when the strokes are inflicted. A district surgeon must examine and certify the accused fit to undergo the punishment before it can be inflicted.

Generally - Whipping may not be imposed on a female nor may it be imposed on a male over the age of thirty years. In cases where a psychoneurotic or psychopathic condition in the offender contributed towards the commission of the offence, whipping may also not be imposed.

A new form of punishment, titled correctional supervision, has been introduced by the Correctional Services and Supervision Matters Amendment Act of 1991. This Act provides that probationers may be placed under correctional supervision for one of the following purposes: observance and supervision, community service, payment of compensation to victims, reintegration of offenders into the community, rehabilitation and collection of funds.

Offenders sentenced thus do not become inmates of a prison but are nevertheless treated in terms of the prisons provisions. The offender remains within the community but may be placed under house-arrest, whilst he is allowed to continue or commence employment. Correctional officials monitor and supervise the offender. Should the offender fail to comply with the conditions of the order, his detention may be authorised by the Commissioner of Prisons and he may be dealt with in one of the following ways:

discharged or released from the order, again placed under correctional supervision or referred back to court within seventy two hours for the passing or putting into operation of a suspended sentence, as the court may decide.

The purpose of imposing punishment in public is also to instil fear into those witnessing it so that they will become law-abiding. Conklin (1989:434) states that punishment does not deter the general public unless they are aware of its imposition. The vast majority of penalties that are imposed are not publicized - usually only those falling within the category of *cause celebre* receive media coverage. Furthermore, not all persons have access to the news media.

Public imposition of punishment, although generally viewed as backward and crude, should in theory at least, give effect to this penal motive of individual and general deterrence.

#### 2.6.3 REHABILITATION

Penalties in terms of the *Shari'ah* has as one of its aims the rehabilitation of the offender. The fact that the offender remains answerable in the Hereafter for offences he committed, despite being punished in the mundane world by a *Qadhi*, should have a salutary effect on his behaviour (Siddiqi, 1988:13).

The *Quran* (Surah 39:Verse 5) amplifies this objective in the following Verse: "But whoever repents after his iniquity and reforms himself, Allah will turn to him mercifully, for Allah is Forgiving, Merciful." In this Verse Allah guarantees that He will be merciful towards the offender if he reforms himself. It can also be seen in numerous other *Quranic* Verses that true repentance is dependant on the offender's rehabilitation.

Punishment in the Hereafter will only be suspended once there is proof that the offender has been reformed (Siddiqi, 1988:25). It should also be remembered that punishment in the Hereafter

takes on a more severe form. Consequently it is expected that once the punishment of the *Shari'ah* has been imposed on the offender he will become rehabilitated and live a law-abiding existence.

In most Western penal systems great emphasis is placed on this motive, often at the expense of the other penal objectives. According to the then Commissioner of South African Prisons, the main emphasis of punishment has been to rehabilitate the offender (Penal Reform News, 1962:10 - 13). The Appellate Division has also recognised the importance of this penal motive - S v. Anderson 1964 (3) S.A. 494 (AD) at 496.

It is clear that the Islamic Penal System recognises reform as an important aim of punishment, since this element is essential to ensure that the offender does not again lapse into criminality. In fact, it views rehabilitation as the ultimate aim of punishment.

#### 2.6.4 PROTECTION OF SOCIETY

The *Shari'ah* does not make provision for the phenomenon of bail, accused, especially those charged with violent crimes may be imprisoned for the purposes of either facilitating an investigation or to protect society. This is especially true with regard to recidivists.

This penal system places the interests of society above those of the individual and, as such, imposes punishment with a view to protecting society from further harm. The Islamic Penal System also views punishment as a form of protection for society, hence its generally severe nature.

The *Shari'ah* allows preventive imprisonment of persons constituting a danger to society on the grounds of public policy (*Siyasa*), even before an offender has been convicted of an offence, in certain circumstances (Schacht, 1986:187). Modern

writers, like Bassiouni (1982:25) disagree with the last-mentioned position and state that incarceration can only result from a penalty imposed subsequent to a criminal conviction.

## **2.7 THE CAUSES OF CRIME**

In terms of the *Shari'ah* there are two major causes of crime, the first being the inner urges of the individual and the second is the effect of environmental influences on group or individual behaviour (Siddiqi, 1988:6). The second category is broader and more comprehensive than the first and includes the incentives or possible gains from the criminal act.

### **2.7.1 INNER URGES**

The emphasis of the Islamic Penal System is on reforming society to a way of life devoid of criminal activities. The focal point is society and not the individual, since the *Shari'ah* views the rights of the individual as secondary to those of society in criminal law matters. All crimes are sins but not all sins are crimes. Thus if society can be prevented from committing sins, the rate of crime will decrease commensurately. (Siddiqi, 1988:6). As with most crimes in the *Shari'ah*, there is the unmistakable link between religiosity and the law.

Sins which individuals commit are caused by inner urges like envy, greed, lust for power, malice, unjustified suspicion, etc. Although these urges in themselves do not amount to crimes, they tend to lead to the commission thereof. These urges generally lead to anti-social behaviour, either against the individual or society. The Islamic Penal System therefore aims at eradicating the commission of these sins so that the rate of crime may also be diminished accordingly (Siddiqi, 1988:6 & 7).

The *Shari'ah* recognises that certain offenders commit crimes not merely as a result of environmental influences, but also due to

an innate urge. Thus they have no one but themselves to blame for the consequences of their criminal activity, and in this sense their punishment is justified. Certain persons will commit crimes, notwithstanding their social environment since the stronger urge to commit an offence is a result of an inner uncontrollable desire.

#### 2.7.2 ENVIRONMENTAL INFLUENCES

People generally have to work in order to secure the necessities of life, like food, clothing and shelter. Because of unequal economic opportunities and an uneven distribution of wealth, not all persons are capable of achieving the same goals. For this reason certain people turn to crime in order to gain an economic advantage, because of their inadequate means (Siddiqi, 1988:7). Although the *Shari'ah* does not view the economic motive as the only one - it agrees that it has a significant influence.

The Islamic Penal System must not be viewed in isolation from the rest of the *Shari'ah*. From an economic perspective, the *Shari'ah* prescribes that the Public Treasury in an Islamic State should ensure that indigent persons are well cared for financially. The *Shari'ah* attempts to provide equal economic privileges and opportunities for all citizens of the Islamic State in order that the lowliest of them may at least be able to afford the basic requirements of life. The assistance thus provided will eliminate the urge to commit economic crimes like theft, robbery and fraud (Siddiqi, 1988:7). These ideals are very similar to those of a welfare state, for example, Bahrain and Kuwait.

To ensure that sexual urges do not lead to rape and other sexually motivated crimes, marriage is made economically and administratively easy. The Public Treasury will assist if the prospective couple is in economic need and will aid them financially in order that they may get married. Mixing of the sexes in public is also prohibited by the *Shari'ah*, whilst women are required to be fully covered and veiled when appearing in



public (Siddiqi, 1988:7 & 8). In this way the *Shari'ah* attempts to eliminate the root causes of sexual offences. Should these measures fail, it applies severe penalties when transgressions of this nature occur.

Muslims are taxed with paying dues (*Zakaat*) to the *Beit ul-Mal* (Public Treasury) for distribution amongst the poor and needy; therefore those in need of money or food could apply to this institution in the Muslim State for assistance. This could effectively reduce financial crimes. In terms of the *Shari'ah*, payment of *Zakaat* is peremptory on those Muslims who qualify to pay it.

However, peer pressure in society could drive an individual to commit a crime, whilst greed, revenge and egoism are also known causes of crime. It must also not be forgotten that Satan also plays a role in causing sins to be committed - as was stated earlier in par. 2.7.1, all crimes are sins (Doi, 1988:219).

Khan (1978:254) is of the view that crimes are caused by man's own inherent evil behaviour since he is the initiator of his own actions. However, in terms of the *Shari'ah*, no person is born a criminal, they become one either through the development of their personality or environmental influences or a combination of the two. Individuals also have the ability to act according to their own free will; they thus have a choice to commit either good or evil. (Khan, 1978:253). Therefore man is accountable for his criminal actions if he is *compos mentis* and above the age of puberty.

Western criminologists are generally of the view that no single theory can explain the complex causes of crime, for example, the bio-physical theory, societal theory, sub-culture theories, etc. (Reckless, 1973:40 - 46). There is a wide variety of factors giving rise to the crime phenomenon, like individual-human factors, environmental factors and the situation the individual finds himself in. The physical environment often creates the

opportunity for crimes to occur (Craft & Craft, 1984:53).

Furthermore, numerous crimes, for example, murder, robbery and fraud often result from rational and purposeful planning on the part of the perpetrator and are not caused by the factors mentioned above (Gunn & Farrington, 1982:14).

The *Shari'ah* takes cognisance of what is considered the more "modern" view that environmental factors have a significant influence on an individual's behaviour. However, this does not detract from the fact that the individual remains fully accountable for his behaviour and criminal actions.

To counteract the negative effects of these environmental influences on the crime rate, the *Shari'ah* has introduced measures to negate or off-set its effect: these are inter alia, factors surrounding the institution of marriage and the resources of the *Beit ul-Mal*.

## **2.8 DEFINITION OF CRIME AND PUNISHMENT IN TERMS OF THE ISLAMIC PENAL SYSTEM**

Crimes can be defined as legal prohibitions imposed by Allah, the infringement whereof warrants punishment. Thus any act for which punishment has been prescribed is a crime (Shaheed Vol.1, 1987:72). *Janayat* is the Arabic word which depicts the concept crime; although it has a very wide connotation which includes delicts (Shaheed Vol.1, 1987:73).

According to Khan (1978:256), in terms of the *Shari'ah*, all crimes consist of three elements:

- \* a penal provision which forbids the criminal act;
- \* the act must take the form of either a commission or an omission; and
- \* the criminal must be liable and responsible for his action.

A crime can broadly be defined as the infringement of a public right and relates mainly to the following: the human body, property, reputation, religion, the State, public peace and morality, and which are punishable by a State authority (Khan, 1978:244).

Voluntary acts can, in terms of the *Shari'ah*, be categorised as follows: obligatory (*fard*), recommended (*mandub*), indifferent (*mubah*), reprehensible (*makruh*) and forbidden and punishable (*haram*). Only acts classified as *haram* are punishable, whilst *fard* and *mandub* acts are rewarded in the Hereafter (Souryal, 1987:433).

In terms of the *Shari'ah* punishment can be defined as a penalty imposed by the Islamic State which can be either *Hadd*, *Qisas* or *Ta'zeer*, on an individual who committed a crime. Before punishment can be imposed it is required that a court renders a guilty verdict. Furthermore, punishment can only be imposed by a *Qadhi*. (Khan, 1978:243 & 244)

Punishment is usually imposed when the interests of either society or the individual are threatened or harmed (Doi, 1984:219). If a Muslim commits a crime (in the context of the *Shari'ah*) in a non-Muslim country, he will become liable for punishment once he returns to the Islamic State (Doi, 1984:220 & 221).

A sin is an act against the rules of Allah and may or may not also constitute a crime. Sins have a religious connotation and Allah declares that those who commit sins will be punished in the Hereafter and those who perform good deeds will be rewarded. (Thanwi, Undated:55). Thus a system of punishment for evil and reward for good actions pervades the Islamic Penal System. Allah also has the choice not to impose punishment, if for example, the offender has been reformed.

In terms of the *Shari'ah*, punishment originated at the time of

Adam and Eve, when both were punished by banishment from the Garden of Eden. The same fate befell Cane after he killed Abel. This is so since Islam does not differentiate between law and religion. In more practical terms, the first established forms of punishment were to be found in the Torah. (Nadvi, 1980:39). Punishment in terms of the *Shari'ah* has a distinct element of religious atonement.

Newman (1985:13) is of the view that punishment preceded society, in that its origin was a consequence of man relating to his natural environment. Philosophers like Marx, Spencer and Freud have all attempted to trace the origin of punishment, but none have a common theme or premise (Newman, 1985:14 & 15).

## **2.9 CRIMINAL LIABILITY**

The *Shari'ah* only prescribes punishment on those who are criminally responsible and this aspect has to be determined before any form of punishment can be imposed (Qutb, 1977:134). According to Ajijola (1983:127), the grounds that exclude punishment in terms of Islamic Law are: insanity, minority, self defence, duress and mistaken belief.

According to Khan (1978:257 & 258), four conditions prevent the imposition of punishment in terms of the *Shari'ah*:

### **2.9.1 COERCION**

No punishment is imposed on those who acted involuntarily or who were forced to act in that manner, since only voluntary actions are punishable.

### **2.9.2 INTOXICATION**

Although the drinking of wine is in itself an offence in terms of the *Shari'ah*, punishment will not be imposed on the person who

acted in an intoxicated state if he unknowingly consumed it. However, if he voluntarily consumes liquor he is liable for his actions. There are three distinct views in this regard: Firstly, Shafi'i and Hanafi jurists do not hold inebriated persons liable for punishment since they lack the capacity to act. They are of the view that such persons should be imprisoned till they are sober.

Secondly, other jurists hold such offenders liable for their actions, except in instances where they were coerced into drinking intoxicating liquor. Thirdly, a further group of jurists hold inebriated offenders fully responsible for their criminal actions irrespective of the manner in which they became intoxicated.

#### 2.9.3 INSANITY

An insane person is not accountable and consequently not punishable for acts committed during periods of insanity; provided that he is liable for those acts committed during lucid periods. Acts committed during *lucidum intervallum* are not punishable. An offender who commits an act whilst he is sane, remains punishable even if he becomes insane thereafter.

However, Imams Maliki and Abu Haneefa are of the view that punishment should be suspended until the offender becomes sane again. Furthermore, if the conviction resulted from a confession, such conviction is suspended since insanity affects the offender's ability to retract the confession. (Lippman, 1988:54 & 55).

#### 2.9.4 MINORITY

Criminal acts committed by a minor are not punishable in very much the same way as is prescribed by Roman-Dutch law. (Khan, 1978:257 & 258).

According to Doi (1984:226), Caliph Ali stated that the following

persons were not responsible for their actions and were therefore not punishable:

- \* insane persons who committed offences whilst they were labouring under a state of insanity;
- \* children below the age of puberty; and
- \* persons acting whilst they were asleep.

In terms of the *Shari'ah* children below the age of seven years are not punishable as they are not responsible for their actions. Those instances where children are between the age of eight years and puberty commit an offence, his family is liable to compensate the victim. From the age of puberty, and if he is of sound mind, he can be punished for his criminal acts. (Lippman, 1988:54). Although in practice juveniles are treated much more leniently than adults and are usually referred to a reformatory for serious offences.

The common law of South Africa (Roman-Dutch Law) provides that children below the age of seven years are irrebuttably presumed to be *doli incapax*, whilst children between the age of seven and fourteen years are presumed to be *doli incapax*. This presumption may be rebutted by either direct or indirect evidence. Children above the age of fourteen years have the same liability as adults, although their youth generally acts as a mitigating factor. (Burchell & Hunt, 1970:185 - 191).

Further defences in the *Shari'ah* which obviate punishment are: necessity, self defence and the right to chastise ones children (Lippman, 1988:55 & 56).

## 2.10 SUMMARY

The Islamic Penal System differs greatly in ambit and emphasis from the traditional Western model, although its objectives are not dissimilar. The essence of the difference between the two

systems exist in the fact that the Islamic Penal System is interwoven with its religious, social and economic tenets, whilst the Western system is almost completely distinct from prevailing religious doctrines. There is no distinction between law and social control in the *Shari'ah* and one can clearly see the relationship between religiosity and punishment.

The two major sources of Islamic Penal Law are the *Quran* and rulings of the Prophet, also known as the *Sunnah*. Other sources of note are interpretations of and analogies based on the above primary sources, namely, *Ijmaa* and *Qiyas* respectively. Islamic Penal Law is interpreted through the four major *Sunni* schools of jurisprudence, Hanafi, Maliki, Shafi'i and Hanbali, and the Jaffaria School of the *Shi'ite* sect, based mainly in Iran and Iraq. These interpretations allow for a measure of flexibility in this traditionally rigid system. However, where a *Quranic* injunction or *Hadeeth* (ruling of the Prophet) is clear and unambiguous, then interpretation by these Schools would not be necessary or permitted.

Islam's judicial system forms an integral part of the body of Islamic Law, namely, the *Shari'ah*. Although criminal cases are heard by a *Qadhi*, minor offences can be referred to arbitration where the penalty is subject to review by a *Qadhi*, according to certain jurists. In this way the *Hakam* (arbitrator) can also impose punishment for minor offences.

Forgiveness and reconciliation are highly regarded virtues of the system, especially with regard to *Qisas* offences. Victims and heirs are urged to forgive the offender in favour of a financial settlement. There is no clear distinction between criminal penalties and civil remedies, although delicts are dealt with according to the private law system.

The traditional penal objectives like retribution, individual and general deterrence, protection of society and rehabilitation also find applicability in this system, albeit of a more practical

nature.

Crimes are caused by two main factors, namely, the individual's inner urges and environmental influences. Individuals have a choice whether or not to commit a crime and therefore they are punishable once they are convicted. Insane persons and children below the age of seven years are exempt from punishment, whilst juvenile offenders are generally dealt with more leniently than adults and are referred to a reformatory as a matter of course, for serious offences.

Punishment in terms of the *Shari'ah* takes on a different dimension in relation to its concept in the Western context. The characteristics, forms and emphasis of punishment is also unique to the Islamic Penal System. In the following chapter the concept punishment will be examined in the context of the *Shari'ah*.



## CHAPTER 3 : THE CONCEPT OF PUNISHMENT IN ISLAM

### 3.1 INTRODUCTION

This chapter views the concept of punishment as it is imposed in the Islamic Penal System and interpreted by the various schools of jurisprudence. It also discusses the manner in which this system addresses the stated penal objectives.

The general characteristics and philosophy underlying the concept of punishment within the context of the *Shari'ah* is examined in this chapter. The *Shari'ah* approaches the question of the implementation of punishment as follows: firstly, punishment is imposed as a last resort; secondly, it is imposed to improve and correct behaviour; thirdly, it is intended to reform the offender and lastly, it aims to correct the imbalance caused by the crime.

An adequate analysis of this concept of punishment will entail an examination of the three categories of punishment, namely, *Hadd* (Prescribed), *Qisas* (Equality) and *Ta'zeer* (Discretionary). The difference between crime and sin is discussed and aspects like, remission of punishment, restrictive evidentiary requirements, repentance and justification for punishment (the *Shari'ah's* position of determinism and indeterminism relative to liability for punishment) are also addressed.

### 3.2 AN OVERVIEW OF PUNISHMENT WITHIN THE SHARI'AH

In order to arrive at a general impression of punishment in the Islamic context, it is necessary to differentiate between sins and crimes. Crimes are punishable offences whereas sins refer to transgressions of divine law or morality and are punishable in the Hereafter. Sins can further be divided into minor (*saghira*) and major (*kabirah*) categories. Examples of the latter are: drinking alcoholic beverages, falsifying evidence against another, practising magic, murder and adultery. (Khan,

1978:244). Crimes are committed either against society or an individual, whereas sins are transgressions against Allah, although a sin can also be a crime.

There are three forms of punishment that can be imposed for crimes in terms of the Islamic Penal System, namely, Prescribed (*Hadd*) Punishment, Equality of Punishment (*Qisas*) and Discretionary (*Ta'zeer*) Punishment.

For those sins which also constitute crimes, the *Shari'ah* prescribes either specific punishment or allows the *Qadhi* to decide which punishment to impose. Punishment for sins is imposed in the Hereafter and takes on a much harsher form. However, if the offender truly repents and reforms thereafter, Allah may relieve him from punishment in the Hereafter. Rewards are granted in the Hereafter for benevolent and pious deeds of individuals.

Juvenile offenders are generally punished more leniently than adults - they are often referred to reformatories for convictions of serious offences and are never imprisoned with adults (Khadduri & Liebesny, 1984:225).

The Prophet had this to say of what entails the greatest sins: "The greatest sin is to associate another with God, or to vex your father or mother, or to murder your own species, or to commit suicide, or to swear to lie." (Khan, 1978:245). Monotheism is an entrenched and cardinal principle of Islam - any deviation from this belief renders such person a non-believer. It is the one sin that Allah does not pardon.

Allah forgives those who truly repent and request pardon for their sin - "God accepts the repentance of those who do evil in ignorance and repent soon afterwards; to them will God turn in mercy: for God is full of knowledge and wisdom." (*Quran, Surah 4:Verse 17*). It is not in itself sufficient if the offender declares that he will henceforth live a law-abiding life, his

existence *de facto* thereafter should mirror this intention.

Schacht (1986:187) is of the view that the *Shari'ah* does not contain a general concept of penal law since important aspects like mitigating factors, theories of attempt and complicity are non-existent. He states further that the Islamic Penal System is rich in theories of punishment and draws a clear distinction between private vengeance and punishment and between coercive and preventive measures.

However, the *Shari'ah* does cover the phenomena of attempt and complicity, as will be seen in chapter eight. Furthermore, mitigating factors are only ignored with regard to *Hadd* and *Qisas* offences; as regards *Ta'zeer* penalties, they do indeed apply.

Islam does have a definite penal philosophy wherein the absence of aspects like mitigating factors regarding *Hadd* and *Qisas* offences are explained. The reason for the seemingly static nature of the Islamic Penal System is that it was not subject to radical and far-reaching changes over the years like other penal systems. However, this could also be seen as one of its weaknesses.

Although the interests of the individual are secondary to those of society in matters concerning criminal law, society can only infringe the rights of the individual when such infringement tends to prevent a threat to the rights of other individuals or society (Doi, 1984:219). It can thus be said that the inherent rights of an individual can only be infringed if the rights of society or other individuals are endangered.

A major problem with the imposition of punishment is to convince the offender of the righteousness of the penalty - the *Shari'ah* attempts to achieve this by means of juxtaposing its penal system to its religious tenets (Doi, 1984:219 - 221). Therefore punishment is seen as lessening the ordeal that the individual will have to endure in the Hereafter and thus it amounts to

atonement for the sins of the offender.

Hence the close relationship between crime and sin and the fact that crimes against society are viewed as if they were committed against God Himself. Crimes take on a sacrilegious mantle and punishment becomes the atonement for the sins committed. In this way punishment takes the form of religious chastisement.

Penal Laws apply to both Muslims and non-Muslims within an Islamic State, whilst Muslims remain liable for punishment for offences committed in non-Muslim countries on their return to the Islamic State. In imposing punishment, the *Qadhi* may not exceed the bounds of what is prescribed in the *Shari'ah*, otherwise he will himself be an offender. (Doi, 1984:220 & 221). The authority of the *Shari'ah* is clearly stated in the *Quranic* injunction contained in *Surah 4*, Verse 59: "Obey God, and obey the Apostle, and those charged with authority among you." This Verse indicates one of the principles of Islamic Penal Law - the laws contained in the *Quran*, *Sunnah* and the laws promulgated by the Islamic State as a consequence of the exercise of *Ijmaa* and *Qiyas* must be obeyed. It creates a bond of obedience between God and humanity and between people *inter se*.

Thus disobedience constitutes both a sin and a crime (Lewis, 1988:91). This does not mean that a Muslim living in a non-Muslim country can ignore that country's laws. A Muslim should obey the laws of his host country in so far as they do not force him to break the laws of the *Shari'ah*.

However, what appears to be an autocratic Penal System is tempered with built in checks and balances. Both the Muslim ruler and his subjects are equally accountable in terms of the law - the Head of State is deserving of no special treatment merely by virtue of his position. In the Islamic tradition, "political ruler" is synonymous with "religious ruler" as politics and religion cannot be separated. (Lewis, 1988:92).

A Muslim's obedience is first to Allah and his Prophet and then to those in authority over him; should a conflict between the two arise, a Muslim is bound to follow the former two authorities. The Muslim ruler can therefore not promulgate legislation which is in conflict with the *Quran* or *Sunnah*. The Prophet is reported to have said: "Don't obey those orders of the Government which compel you to disobey Allah." The authority that is referred to here is a Muslim authority in an Islamic State. (Shaheed, 1983:6 & 7). However, should an individual be forced to compromise on a law of the *Shari'ah*, Allah will not hold that person liable, since he acted as a result of coercion (*Quran*, Surah 1: Verse 225).

The above ruling of the Prophet makes it clear that any law promulgated by an Islamic authority will be null and void if it conflicts with a law contained in the *Quran* or *Sunnah*. Furthermore, no punishment will flow from an act of disobedience to such laws, either in this world or in the Hereafter.

Punishment that is prescribed in the *Quran* cannot be increased or ameliorated in any way, even under the guise of showing mercy to the offender. This is clear from the following injunction in the *Quran* (Surah 24:Verse 2): "Let not compassion move you in their case, in a matter prescribed by God, if ye believe in God and the Last Day." This rule applies specifically to *Hadd* and *Qisas* punishment.

There is no provision for mitigating factors to be considered when *Hadd* punishment is imposed, but safeguards exist prior to a conviction, namely, a strict criteria (beyond a shadow of a doubt), restrictive evidentiary requirements and a social and economic system which promotes non-criminal behaviour.

From a practical perspective the objectives of punishment in terms of the *Shari'ah* can be stated as follows:

\* imposition of a penalty which is equivalent to the harm

caused;

- \* deterring the individual offender from committing further offences in the future;
- \* generally deterring the public from committing offences;
- \* increasing the deterrent effect of punishment by having it imposed in public;
- \* preserving property;
- \* protecting the chastity of women; and
- \* preserving and protecting life (Siddiqi, 1988:10 & 11).

The above objectives encompass a comprehensive overview of all the aims of the Islamic Penal System and in the discussion of the Islamic penal philosophy these objectives will be elucidated.

Assault victims are in much the same position as the heirs of a murdered deceased - both have the right to either waive punishment for the offence or demand that the prescribed punishment be imposed. In the former instance the victim or heir, as the case may be, may then demand payment of *Diyya* (blood-money) instead. The victim or heir may also waive payment of *Diyya* and forgive the offender.

There is thus a distinct difference between punishment as prescribed by the *Shari'ah* and that formulated in terms of non-Muslim authorities. The major difference being the element of religion and divine law contained in laws emanating from the *Shari'ah*. There is very little, if any, provision for deviating from the *Shari'ah* when prescribed punishment has to be imposed.

Thus punishment for various offences in Western countries vary from time to time and country to country, for example, a pre-pubescent boy could be hanged in England for stealing tuppence in the eighteenth century, whereas today such offence would generally go unpunished due to the age of the offender. This is especially true of "political" offences, as the category of this species of offences would alter with a change in government. (Shaheed, 1983:13).

However, the same cannot be said of the Islamic Penal System, which has remained virtually unchanged over the years, i.e. since it was promulgated in the *Quran* and *Sunnah*. There is no authority in the mundane world that can alter the laws so prescribed, especially with regard to *Hadd* and *Qisas* offences.

The *Shari'ah* only prescribes punishment for violations of human rights like murder and adultery, but not for violations of what are strictly religious practices, like failing to pray or observe the period of fasting (Nadvi, 1980:44). Such punishment is reserved for the Hereafter since they only constitute sins and not crimes.

### **3.3 ISLAMIC PENAL PHILOSOPHY**

The Islamic Penal System finds its inspiration in the following Verses: "Every soul is held in pledge for its own deeds" (*Quran*, Surah 74:Verse 38) and "Each soul earneth on its own account nor doth any laden bear another's load" (*Quran*, Surah 6:Verse 165). These Verses provide the basis for individual responsibility and the abolition of the principle of vicarious liability in its application to punishment (Ramadan, 1961:55). The *Shari'ah* projects an ontological and religio-philosophical concept of man, his environment and culture (Nadvi, 1989:322).

In terms of the *Shari'ah*, individuals are not punished for their thoughts, only their actions, according to a ruling of the Prophet: "Allah has forgiven the people belonging to my Ummah for the notions coming into their minds unless they utter them or put them into practice." (Shaheed Vol. 2, 1987:41). Neither is an individual liable to be punished for any preparation of a wrongful act. This includes procuring the necessary means to commit a criminal act, unless such procurement is *per se* a crime (for example, acquiring wine for the purposes of consumption). Only criminal acts or an attempt or conspiracy to commit such criminal act, is punishable. (Shaheed Vol. 2, 1987:42).

Punishment is justified because of the offender's deliberate abuse of the freedom to choose between right and wrong and the consequent wrongful conduct (Amin, 1985:21). The Islamic Penal System has embarked on a process of eradicating crime from its very source, and it is only when these preventive measures have not been effective enough to prevent the offender from committing a crime, that the provision of punishment is exercised.

The primary preventive factor is belief in the Hereafter and the fact that punishment can flow from every sinful act of an individual, whether the State authorities have become aware of the crime and whether or not the offender has been punished in the mundane world for such act. Thus no matter how secretly an offender commits an offence, such action is known to Allah and the offender could be punished accordingly in the Hereafter. It is for this reason that confessions are very common and many offenders even request to be punished for their crimes in the Islamic State, for example, the case of Caliph Omar's son (discussed in chapter four, par. 4.2.5).

The second major preventive measure is the Public Treasury of the Islamic State (*Beit ul-Mal*). This institution's function is to ensure that no economic crime is committed as a result of an individual being financially in need. The poor and destitute of society have to be supported by the Public Treasury until they become self-sufficient. Even those who forgo marriage due to lack of financial means can receive assistance in this regard.

The third preventive measure is the institution of marriage. It serves to prevent offenders from committing sexual offences since the *Shari'ah* reasons that if people marry when they are young, preferably shortly after they reach puberty, they will not only live more responsible lives, but will also have legitimate avenues for their sexual urges. For this reason celibacy is forbidden in Islam. Furthermore, all extra-marital sexual relations, irrespective of its nature, even lustful glances, are forbidden by the *Shari'ah*. (*Quran, Surah 24:Verses 32 & 33*).



The Islamic Penal System cannot operate other than in a true Islamic State, since its prescribed penalties can only operate against its social and economic background, otherwise they will be disproportionately harsh in relation to the offence.

Punishment is prescribed by the *Shari'ah* because prohibitions alone will not prevent its occurrence; the fear of punishment reinforces prevention. Certain actions like adultery and the consumption of alcohol have been criminalised because ultimately they are detrimental to society as a whole. (Shaheed Vol. 1, 1987:74). In this instance the *Shari'ah* pre-empts the occurrence of criminal activities.

The *Shari'ah* has established the Islamic Penal System to deal with those persons who are nevertheless not deterred by the threat of punishment in the Hereafter. The system is in place to ensure that the collective interests of society are safeguarded and to secure the survival of the whole social edifice. (Shaheed Vol. 1, 1987:75).

If an individual commits a crime which is at the same time an act of misconduct *vis-a-vis* his employment relationship, he will not be liable for discipline imposed if he is punished for the criminal act, since this would amount to punishing the person twice for the same offence, whilst further punishment could still be imposed in the Hereafter (Shaheed Vol. 1, 1987:81).

Most jurists of the four main *Sunni* Schools are of the view that pre-trial detention is not allowed since an accusation of guilt in itself is not sufficient reason to justify an accused's incarceration (Lippman, 1985:47). The noted jurist of the Hanafi School, Abu Yusuf, was not in favour of pre-trial detention. However, Abu Hurreira reported that the Prophet permitted detention of a suspected offender before he was convicted. (Bassiouni, 1982:75).

According to Lippman (1988:124), the Islamic Penal System can be

credited with highlighting and developing important areas which are generally accepted as having an influence on the science of penology:

\* Strong emphasis on the link between law and the community and facilitating the prevention of crime through social support. Unless the community have confidence in the law and have the opportunity to make a contribution to its formulation, they will not have a commitment to uphold it. The law should not be alien to the community but should have their respect and confidence. The increased lawlessness in South Africa, especially amongst the disenfranchised is symptomatic of a great divide between the law and those who are expected to obey it, namely, society.

This has led to, *inter alia*, the establishment of "peoples courts" meting out horrendous penalties because large sections of society have lost confidence in the law. A further reaction is the increased instances of people taking the law into their own hands (Cape Times, 22/2/92). In the last-mentioned case a mob of people in a township "executed" two persons after they "confessed" to having killed someone.

\* Acceptance of economic well-being and moral upliftment as crime inhibiting measures.

A downturn in the economy and the subsequent impoverishment of people leads to an increase in crimes of dishonesty, like theft, fraud and robbery. Persons who have no income or a family to support will have lesser resistance to committing these crimes since their sense of survival will overshadow any societal pressure or threat of punishment.

\* A more active and visible role for victims and provision for victim compensation.

Victims are often referred to as the step-children of the criminal justice system, since their major role is perceived to be giving evidence in court. Hence the reluctance of many victims to report crimes, especially rape and other acts of

sexual abuse. It is essential that victim compensation programmes be established by the State to ensure that victims are adequately compensated for their loss. This fund can be partly programme by fines and compensatory orders paid by offenders. Victims of sexual offences, especially young children, should also have an adequate support system to cater for their physiological and psychological needs.

\* Mandatory punishments for serious offences against society. Although mandatory punishment for serious offences could erode the discretion of judicial officers in the exercise of their sentencing function, so vital for the imposition of an appropriate penalty, which will serve the needs of the individual on whom it is imposed and society. However, mandatory sentences could be seen as adding a measure of certainty to the punishment process and act as deterrent since offenders will be aware that their mitigating circumstances will not guarantee a more lenient sentence. Often these mitigating factors have an element of aggravation in them, for example, offenders who have families to support should more especially avoid involvement in criminal acts and likewise those who have a low tolerance or violent reaction to liquor and drugs.

\* Swift imposition of punishment which humiliates the offender. Imprisonment generally does not rehabilitate offenders; at most it protects society from violent criminals. This is especially so if prisons are overcrowded and rehabilitation programmes are lacking or non existent. A shortage of professional staff to assist in these programmes only exacerbate the problem. Therefore lesser emphasis should be placed on imprisonment and more research should be conducted into penalties that offenders can serve within the community. More use should be made of diversion and supervision within society for offenders.

\* Lesser emphasis on imprisonment as a means of rehabilitation. Punishment that is equivalent to the crime will be viewed as "just punishment" by both the offender and the victim. Although

the harm caused is not always easy to calculate, it is sufficient if there is a close relation between the two. It could have negative consequences on the offender if he perceives the penalty to be far in excess of the harm caused; on the other hand, the victim will be left with a feeling of dissatisfaction if the penalty is viewed as lenient in relation to the harm caused.

- \* A serious attempt at equating punishment with the harm caused.

The *Shari'ah* acknowledges that it is not always possible to impose a penalty which is equal to the harm caused, but nevertheless endeavours to equate the punishment with the harm caused.

#### **3.4 CHARACTERISTICS OF PUNISHMENT PRESCRIBED BY THE SHARI'AH**

The *Shari'ah* is unique as a legal system since it not only prescribes punishment for the commission of crimes, but also has built into its system, a number of comprehensive measures aimed at preventing crimes before they occur and to ensure that the traditional causes thereof are inhibited or even nullified.

In the early days of Islam (during the latter half of the seventh century) a document called the "Constitution of Medina" contained the following principles relating to punishment:

- \* That all adherents of Islam are regarded as one community;
- \* that each sub-division of this community was responsible for paying the *Diyya* of its members; and
- \* that community members should collectively oppose and prevent crimes within the community and should not support crime, even if the perpetrators were close relatives. (Lippman, 1988:78).

This served as a form of social contract between Islam and its adherents, and, coupled with the ultimate reckoning on the day of Judgment, acted as a basis for crime prevention.

There are traditionally four distinctive features of the Islamic Penal System: punishment is imposed as an absolute last resort, when the preventive measures have failed; punishment is imposed with the intention of it serving as a lesson to others; punishment is intended to rehabilitate the offender so that he reverts to being a law-abiding citizen; and punishment is intended to redress the wrongs caused by the crime and to appease the victim.

The *Shari'ah* supports the doctrine of *nulla crimen sine lege*, in that punishment may only be imposed on an offender once he has transgressed the law (Khadduri, 1984:143). He should furthermore be aware of the unlawfulness of his actions.

#### 3.4.1 PUNISHMENT IS IMPOSED AS A LAST RESORT

In order to prevent crimes, the *Shari'ah* has certain built-in curbs, both of an internal and external nature. Using the prevention of sexual offences as an example the internal and external restraining measures within the *Shari'ah* will be analysed.

Firstly, the basis of the internal measures is belief in the Hereafter. In terms of the *Shari'ah* all the deeds performed by every person are recorded and they will be judged and may be punished accordingly for their wrongful deeds on the Day of Judgment. This is aimed at having a restraining effect since God is aware of all acts of human beings, whether or not their actions are detected by other individuals or law enforcement agencies. Thus there is no escape from the fact that all ones actions, good or bad are known to Allah. Those who believe in the Day of Judgment will no doubt be deterred from committing crimes which invoke severe penalties in this world and in the Hereafter. (Siddiqi, 1988:13 & 14).

Secondly, the *Shari'ah* makes provision for mainly two external preventive measures. The first being the institution of marriage

and the second is restraint on free mixing of the sexes.

#### 3.4.1.1 THE INSTITUTION OF MARRIAGE

Allah states in the *Quran* (*Surah 24:Verses 32 & 33*): "Marry those among you who are single, or those virtuous ones among your slaves, male or female: if they are in poverty, God will give them means out of His grace: for God encompasseth all, and He knoweth all things. Let those who find not the wherewithal for marriage keep themselves chaste, until God gives them means out of His grace."

Thus the individual is confronted with two choices regarding sexual activity: a lawful marriage can either be contracted or a life of chastity for the person who does not marry. Since the last-mentioned choice is frowned upon by the *Shari'ah*, marriage is the only means whereby sexual activity can occur.

Marriage is not only viewed as sacred but is also recommended when the parties are eligible. In fact it is looked upon as a form of worship. Celibacy is not encouraged, whilst unmarried persons are assisted financially by the Islamic State Treasury to enter into marriage. Those above the age of puberty but yet unmarried, should remain chaste since pre-marital sexual activity of any kind is absolutely forbidden in Islam.

This position on marriage is echoed by the Prophet in the following ruling reported by Bukhari: "O assembly of young people! Whoever of you has the means to support a wife, he should get married, for this is the best means of keeping the looks cast down and guarding chastity, and he who has not enough means, let him keep fast, for this will act as restraint." (Siddiqi, 1988:15). It is incumbent on those persons of marriageable age and who are at the financial means, to get married. The purpose of this rule is to channel sexual urges via legitimate means and thereby reducing the chances of rape or other unlawful sexual activity.

The *Shari'ah* rationalises that if all persons above the age of puberty were married, then in theory at least the chances of them participating in an act of extra-marital sex are lessened. Should they be overcome by their sexual urges they should fast in order that this urge be reduced.

The *Shari'ah* forbids a monastic life for males, and in fact, allows a man to marry up to four wives simultaneously, under certain conditions. Marriage is further facilitated by the fact that widows are allowed to remarry after expiry of the required period after the death of her husband (four months and ten days). Widowers can marry immediately after the death of their spouse. (Siddiqi, 1988:15 & 16). Divorce is also administratively easy and cost-free, although financial provisions have to be undertaken toward the dependant children and needy spouse. After the divorce the parties are free to marry someone else, provided the woman waits for a specific period to determine whether or not she is pregnant, and if so, to wait till the birth of the baby before she can remarry.

A further inhibiting factor to sexual misdemeanours is the fact that fornication is severely punished in terms of the *Shari'ah*, whilst sexual relations between married persons is considered to be a form of worship (Siddiqi, 1988:16).

#### 3.4.1.2 RESTRICTION ON MIXING OF THE SEXES

Islam places severe restrictions on the free mixing of men and women who are not married to each other. A woman's activities are virtually restricted to her home (her father's home if she is single and her husband's home if she is married). The *Quran* (*Surah* 33:Verse 33) contains the following injunction in this regard: "And stay quietly in your houses, and make not a dazzling display, like that of the former times of Ignorance;"

In this way the quantity of possible victims of sexual offences is greatly reduced; although this fact may not be significant

since it is common knowledge that many victims of sexual abuse are related to the perpetrator or are family friends.

In the following Verse the *Quran* (*Surah 33:Verse 59*) makes the full covering of women obligatory when they are in the presence of men who are not their husbands, fathers, brothers or sons: "O Prophet! say to thy wives and thy daughters and the women of the believers that they should cast their outer garments over their persons; this will be more proper, that they may be known (ladies of reputation); and thus they will not be given trouble." This entails the full covering of the figure of the woman with loose fitting clothing, except for her face and hands.

Unless they are married to one another, men and women are not allowed to gaze at each other with passionate desire. This act is forbidden in the *Quran* (*Surah 24:Verses 30 & 31*) by the following statement: "Say to the believing men that they should lower their gaze and restrain their sexual passions. That is purer for them. Lo! Allah is aware of what they do. And say to the believing women that they should lower their gaze and restrain their sexual passions and should not display their ornaments except what appear thereof."

The casting of these passionate or lustful glances are categorised as minor degrees of fornication, although no punishment is prescribed for such acts. However, since also they constitute sins, they are punishable in the Hereafter. By forbidding this form of activity the *Shari'ah* is attempting to prevent the initial act that could lead to illegal sexual activity.

Privacy of family life is another aspect which receives protection from the *Shari'ah*. No one is allowed to enter the abode of another unless permission to enter is granted by those resident therein. The *Quran* (*Surah 24:Verse 27*) has this to say about entering a home other than by a resident thereof: "O you who believe! Do not enter houses other than your own houses



until you have asked permission and saluted their inmates."

This injunction emphasises the importance of privacy, especially that of women. It is recommended that a house should only be entered through the front and not the back door. This is to prevent possible unnoticed invasion of one's privacy. The Prophet has also forbidden persons to peep into homes in which they were not resident. Neither may a man enter the home of his sister or mother until he is permitted to do so. (Siddiqi, 1988:20).

Courtship is also forbidden by the *Shari'ah*. Men and women who are not married to each other may only approach each other face to face under restrictive conditions. The *Quran* (Surah 33:Verse 53) contains the following injunction in this regard: "And when you ask them (the wives of the Holy Prophet) for anything you want, ask them from behind a curtain, that makes for greater purity for your hearts and for theirs."

The practical application of this Verse would effectively exclude mixed social gatherings; co-educational schooling, college and university education; and working in close proximity in offices, factories and other places of employment.

Pornography and other explicit sexual literature is expressly forbidden by the *Shari'ah* as well as the false accusation of fornication or adultery - "And those who accuse free women of fornication, then do not bring four witnesses, scourge them with eighty stripes, and never admit evidence from them; for such men are indeed transgressors. Except those who repent after this and act alright, for Allah is Forgiving, Merciful." (*Quran*, Surah 24:Verses 4 & 5). These persons who falsely accuse men or women of fornication or adultery, commit an offence thereby.

The *Shari'ah* views pornography as a factor which could give impetus to the incidence of deviant sexual behaviour. Pornography of any nature, even that which is considered to be "soft-porn" is prohibited in the Islamic State. Severe *Ta'zeer*

penalties will be imposed for the possession of pornographic material in Muslim countries.

Allied to the above restrictive social requirements are the severe penalties which are prescribed for unlawful sexual activity. Should the preventive measures fail in their endeavour to prevent sexual crimes, the deterrent effect of the prescribed punishment, which is meted out in public, will assist in further preventing the occurrence of the said offences. Although the penalties are severe if viewed in comparison to those applicable in most Western countries, the criteria to secure a conviction is that of beyond a shadow of doubt and not beyond reasonable doubt, the usual criteria for proof in criminal trials.

Shari'ah Courts bend in favour of the accused and will acquit if the slightest doubt exists as to his guilt. It is reported by Tirmidhi that the Prophet said: "Protect the Muslims as far as possible against the application of the law. Let the culprit off if he can possibly be let off. For the Imam making a mistake in forgiving is better than his making a mistake in applying the Law." (Siddiqi, 1988:21 & 22). Thus in terms of the Shari'ah a Qadhi must acquit an accused if there is the slightest doubt as to his guilt.

#### 3.4.2 PUNISHMENT IS IMPOSED TO IMPROVE AND CORRECT BEHAVIOUR

In the event of the above social restraints failing, severe penalties await the perpetrator unless there is some excuse or justification for the criminal behaviour. Punishment is not only aimed at preventing other potential transgressors from acting in a like manner, but also at improving the behaviour of the offender in question. It is primarily for this reason that punishment is carried out in public. (Siddiqi, 1988:22 & 23). The public is actually informed before-hand of the venue and nature of the punishment to be imposed.

3.4.3 PUNISHMENT IS INTENDED TO REFORM THE OFFENDER

The Quran usually couples the mundane penalty with further punishment in the Hereafter. In this way the offender becomes aware that punishment in this world does not signal the termination of his culpability; further punishment awaits him on the Day of Judgment. Thus there will be a greater motivation to improve behaviour since the Hereafter is a life in perpetuity and the punishment at that stage also takes on a much harsher form. An example of this double penalty can be seen in the following Quranic (Surah 25:Verses 68 & 69) injunction: "And he who does this shall (not only) receive the punishment (but) the chastisement shall be doubled to him on the Day of Resurrection, and he shall abide therein in abasement."

3.4.4 PUNISHMENT AIMS TO SET RIGHT THE  
IMBALANCE CAUSED BY THE CRIME

Punishment in terms of the *Shari'ah* has a strong equalising element, a fact which is sanctioned by the Quran (Surah 2:Verse 178) as follows: "O ye who believe! The law of equality is prescribed to you in the case of murder, the free for the free, ..." In other Verses of the Quran the word "retribution" is used interchangeably with "equality".

The victims, or heirs of crimes of assault and murder respectively, have a discretion either to have the court impose the prescribed punishment on the offender or to claim compensation for the injury or harm suffered. A feeling that justice has been done should thus be experienced by the victim or heirs and the urge for revenge will be counter-balanced.

If the Islamic State fails in its endeavour to provide full employment, it is obliged to support the adversely affected person and his family financially from the *Beit ul-Mal* (Siddiqi, 1988:29). It is reported that the Prophet said: "The Government is the guardian of the people." (Siddiqi, 1988:30). In terms of

the *Shari'ah* the Islamic State has to serve and protect its citizens. Punishment should therefore be in the public's interest and should be seen in that context.

Shaheed (Vol. 2, 1987:84 - 90) states that punishment in terms of the *Shari'ah* has four major characteristics:

- \* It should serve to admonish and chastise the offender.
- \* To deter others from committing offences by punishing the criminal.
- \* Punishment should be proportionate to the harm caused.
- \* All persons, irrespective of race, status or economic position, should be subject to the same punishment.

### **3.5 CATEGORIES OF PUNISHMENT**

Punishment in terms of the *Shari'ah* can be divided into three broad categories: *Hudood*, *Qisas* and *Ta'zeer* ( Siddiqi, 1988:51).

#### **3.5.1 PRESCRIBED PUNISHMENT (HUDOOD)**

*Hudood* is the plural of *Hadd*, which literally means restraint, prevention or hinderance and in the Islamic Penal System refers to a restrictive decree or law of Allah (Siddiqi, 1988:51). The legal meaning refers to the limits of punishment which have been fixed by the *Quran* and *Sunnah* (Khan, 1978:268). In certain instances specific action is outlawed in the *Quran*, but the punishment is to be found in the *Sunnah*, whilst in others both the crime and punishment are prescribed in the *Quran*. There are no instances where the offence and the punishment has its source in the *Sunnah* only.

Pearl (1979:20) refers to *Hudood* as compulsory punishment. This category of punishment is compulsory in the sense that once the specific offence has been proven beyond a shadow of a doubt, the *Qadhi* has no discretion but to impose the punishment,

notwithstanding any extenuating circumstances or mitigating factors prevailing.

Generally no one is exempt from *Hadd* punishment. The Prophet is reported to have said that even if his daughter committed an act of theft, he would have her hand amputated (Karim, 1939:489). Neither the victim nor the community can annul *Hadd* punishment (Shaheed Vol. 1, 1987:85). Once the court determines that a *Hadd* offence had been committed, the *Qadhi's* only power is to impose the prescribed punishment in terms of the requirements of the *Shari'ah* (Shaheed Vol. 1, 1987:88).

According to Doi (1984:220) the purpose of *Hadd* punishment is to reform and re-educate offenders in order to render them and those who witness the punishment, law-abiding in the future. Allah has set the limits for *Hadd* penalties in the *Quran* and *Sunnah*, and, as such no new offences can be added to this category. Neither can the punishment prescribed for these crimes be changed in any way. Siddiqi (1988:51 & 52) states that *Hadd* punishment applies to the following offences:

- \* Adultery and Fornication (*Zina*);
- \* False Accusation (*Qadhf*);
- \* Armed Robbery (*Hirabah*);
- \* Theft (*Sariqah*);
- \* Consuming Wine (*Khamr*) and other Intoxicating Substances;
- \* Apostasy (*Irtidad*); and
- \* Deserting the Battlefield in *Jihad* (*Al-Firar Min-Zahf*).

Schacht (1986:175) refers to *Hudood* as "Allah's restrictive ordinances par excellence". The types of penalties that are prescribed in this category are: death by stoning; exile or imprisonment; crucifixion; decapitation with a sword; cutting off of the hand and/or foot; and lashes. As *Hadd* constitutes a right of Allah, no pardon or settlement is possible. However, active repentance or *taubah*, like a thief returning the stolen goods to its rightful owner before a charge is laid, could cause the *Hadd*

punishment to lapse. In such event the *Hadd* punishment is not imposed and the theft will be treated as a delict (*jinayat*). (Schacht, 1986:176). *Hadd* punishment is thus not rigidly applied in all instances, theft being a case in point.

*Hadd* penalties are usually applied restrictively as a result of its severe nature, for example, a false accusation of fornication or adultery is a punishable offence. A further way of restricting its application is by the narrow definition of the offences for which *Hudood* is prescribed. (Schacht, 1986:176 & 177). Numerous restrictions ensure that *Hadd* penalties in many instances exist more as a threat than an actual form of punishment. This is borne out by the fact that lapidation and amputations are rare occurrences.

If a person confesses to having committed an offence for which *Hadd* punishment is prescribed, he is permitted to withdraw such confession. The *Qadhi* can even suggest such action to the accused. (Schacht, 1986:177). In order for a conviction to ensue however, this confession must be voluntarily made on four separate occasions for the offence of adultery and on two different occasions for other *Hadd* offence.

This category of punishment is unique to the Islamic Penal System, mainly for the following reasons: Firstly, the offences for which punishment is prescribed are viewed to be against both *Allah* and society. A distinct religious element is present, whilst in most non-Muslim penal systems, crimes are actions either against individuals or society. However, blasphemy, which is a crime against God in terms of Roman-Dutch Law (the common law of South Africa), resorts within the same category as apostasy, according to Van der Linden (Hunt, 1970:286). Although there is no incontrovertible evidence that blasphemy is not punishable as a result of abrogation, there has been no recent prosecutions for this offence (SALJ, 1964:93).

Secondly, the elements of mitigation and extenuation are

expressly excluded. In terms of South African criminal law a court has to consider extenuating factors before passing sentence in a capital offence like murder. Although the death penalty is not peremptory on a conviction of murder, extenuating circumstances can affect the quantum of punishment imposed (Van der Merwe, 1991:6 - 13). This concept was introduced into the South African legal system via Act 46 of 1935 and has applied up to and including 1990.

Thirdly, the penalties are generally severe for offences which are considered to be less serious or even non-criminal in Western countries. For example, apostasy, drinking liquor, adultery and fornication are generally not considered to be offences in the West, in fact, drinking liquor in moderation is considered acceptable behaviour.

In practice *Hadd* punishment is imposed concurrently if more than one of this type of offence is committed and the offender has not yet undergone punishment for the earlier offence (Khadduri & Liebesny, 1984:234).

According to Bassiouni (1982:195) the nature of *Hadd* penalties is such that offenders cannot become accustomed to it, like fines or imprisonment, as it is severe and fearsome. The severity of the *Hadd* punishment must be measured against the harm caused by the respective offence. These harsh penalties bear testimony to the high value Islam places on fair and proper conduct between individuals (Bassiouni, 1982:196). Potential offenders usually fear punishment which is severe but just.

### 3.5.2 EQUALITY OF PUNISHMENT (*QISAS*)

The word *Qisas* means equality or equivalence and pertains to the equal degree of punishment for the harm caused (Bassiouni, 1982:203). *Qisas* entails the imposition of a penalty which is similar to the injury or harm caused, but is not permitted in doubtful cases. The imposition of *Qisas* is limited to only

certain offences, like murder and assault, where physical injury is inflicted. (Ajjola, 1983:127 & 128). The word equality is more appropriate than retaliatory because the latter element can be substituted by compensation.

The following Quranic (Surah 2:Verse 178) injunction was specifically introduced to end indiscriminate revenge actions: "O you who believe! the law of equality is prescribed to you in cases of murder: the free for the free, the slave for the slave, the woman for the woman. But any remission is made by the Wali of the slain, then grant any reasonable demand, and compensate him with handsome gratitude. This is a concession and a mercy from your Lord. After this, whoever exceeds the limits shall be in grave penalty."

This Verse introduced the Law of *Qisas* into the *Shari'ah*. The contents thereof should however, not be taken literally, otherwise it could leave the impression that a woman should be punished if another woman was killed, even if the perpetrator was a man. What it in fact means is that punishment equal to the harm caused should be imposed. The comparisons of the same category of people serves to emphasize the element of equality.

*Qisas* is obviously only suitable for offences like murder, culpable homicide and physical assaults, since it entails a penalty based on reciprocity. Furthermore, only certain types of assaults are covered by this form of punishment, namely, those of a physical nature.

Primarily *Qisas* means the giving of a life for the taking of a life in cases of murder. There is, however, a difference from the pure form of retaliatory action with regard to cases of assault in that the injured person can remit the penalty, in the same way the heirs in the case of a murdered person can waive the imposition of the death penalty and demand *Diyya* in its stead. (Siddiqi, 1988:52). Punishment in terms of *Qisas* can be waived in favour of a monetary settlement at the instance of either the



injured party in the case of assault or the heirs of the deceased, in the case of murder. It thus entails a mixture of civil and criminal sanctions in the form of a penal provision.

In practical terms this means that the life of the murderer should be taken in return for killing the victim. The manner of execution need not be similar to the way in which the murder was committed, although many jurists, for example, Imams Malik and Shafi'i, are of the view that it should. In Islamic States the form of execution varies from beheading with a sword to hanging and shooting by firing squad.

In the period prior to the advent of Islam in the sixth century, the practice in Arabia was to take revenge if a murder was committed, irrespective of how long ago it occurred. Any innocent person belonging to the enemy camp was a potential victim, and as could be expected, this eventually led to a chain reaction of killings. (Doi, 1984:232). The introduction of the law of *Qisas* was a direct consequence of these acts of revenge killings and further resulted in Islam outlawing revenge and giving the *Shari'ah* courts the sole prerogative of imposing punishment for all criminal offences.

Retaliation in the *Shari'ah* is applied with a strict sense of justice, whilst making provision for mercy and forgiveness. The heir of the slain person can remit the retaliatory punishment and demand compensation in its stead (Doi, 1984:233). The heirs are usually the closest relatives of the deceased and would also be the most likely to accede to a request for mercy since they will benefit financially as a result of their decision.

The *Quran* shows a distinct preference toward the heirs choosing compensation instead of retaliation, since such act will be rewarded in the Hereafter (Bassiouni, 1982:205). *Diyya* differs from a fine in the sense that the recipient is the heir or victim and not the State.

Since the family of the offender is responsible for paying the *Diyya*, if the offender is not at the means to do so, the extended family exerts considerable pressure over potentially errant members, to conform (Bassiouni, 1982:207). If the victim or heir chooses the punishment option, it should be imposed in the least painful manner (Bassiouni, 1982:209). The punishment is not inflicted by the victim or heirs, but by trained State officials (Bassiouni, 1982:232).

The Law of *Qisas* was not a unique concept to the Islamic Penal System, in fact it had its origin in the Mosaic Law, although the element of mercy was only introduced with the advent of Christianity. It was introduced from the Torah into Islamic Law via the *Quran*. Although this form of punishment resembles a civil sanction, it is usually imposed in addition to *Ta'zeer* punishment.

In instances where the murderer is untraced or not identified, the *Beit ul-Mal* has the obligation of paying the *Diyya*. If the victim was killed by a group of persons, all will be jointly liable, whilst if the murderer was insane his relatives will be ordered to pay the *Diyya*. (Doi, 1984:234). There exists an obligation on the family of an insane person to take complete care of him.

However, it should be remembered that despite the fact that the heir waives the imposition of punishment in favour the payment of *Diyya*, the *Qadhi* can still impose *Ta'zeer* punishment in the case of murder and assault. This punishment is imposed since the offence nevertheless entails an infringement of the rights of society, thus giving the courts the right to redress this wrong. The penalty that is usually imposed in cases of murder, is one or more years of imprisonment in addition to the payment of *Diyya*.

Thus the Islamic State still retains the right to impose punishment, usually in the form of imprisonment for the harm caused to the rights of society. In instances of assault, this

law operates along similar lines, except, that the person exercising the discretion is the victim personally.

### 3.5.3 DISCRETIONARY PUNISHMENT (TA'ZEER)

Ta'zeer punishment is not specifically defined and its form and quantum are left entirely to the discretion of a *Qadhi*. It can take the form of lashes, exile, imprisonment or a mere warning (Doi, 1984:220). This category of punishment resembles the concept of punishment which occurs in most non-Islamic countries and is thus often referred to as penal punishment.

Ta'zeer is imposed at the discretion of the *Qadhi* where *Hadd* or *Qisas* punishment does not apply. The severity thereof is dependant on the right that has been infringed, and the harm caused. The types of offences for which this penalty is imposed are those against property, life and the public peace. It is also imposed in those instances where all the requirements for the imposition of *Hadd* punishment have not been satisfied.

According to Karim (1939:574) the main objective of Ta'zeer is correction and reformation of the offender, whilst punishment is progressive if the crimes are recurring.

Although only one *Hadd* punishment can be imposed at a time, Ta'zeer penalties can be combined with any other category of punishment (Shaheed Vol. 1, 1987:86). The *Qadhi* has a wide discretion in imposing Ta'zeer punishment, but is obliged to do so within the parameters and spirit of the *Shari'ah*. The main difference in the philosophy underlying *Hadd* and Ta'zeer penalties is that the former is aimed at applying unaltered and in perpetuity, whereas the latter can change according to the needs and dictates of society (Shaheed Vol. 1, 1987:87).

When such punishment is to be imposed, the element of mitigation applies fully and the personal circumstances of the accused must be considered before any punishment is imposed.

*Ta'zeer* is essential for the growth of Islamic Penal Law, either by way of *Ijmaa* or *Qiyas*, in order that it may keep pace with the developments encased in changing times. It also fills the gap in existing offences where no specific *Hadd* or *Qisas* penalties have been prescribed.

The category of *Ta'zeer* punishment also presents the *Qadhi* with a wide discretion to impose a penalty for any act which he deems to be offensive to good morals, civil wrongs, good manners or religious tenets (Schacht & Bosworth, 1974:399). Thus the ambit for the implementation of this penalty is wider and more flexible than that prevalent in most Western penal systems.

According to Bassiouni (1982:213 & 214) *Ta'zeer* punishment applies in the following circumstances:

- \* Penalties for offences which are related to *Hadd* offences, for example, theft of goods which are valued less than the *nisab*, attempted adultery and unnatural sexual acts committed between women.
- \* Instances where *Hadd* punishment would have been imposed, but for lack of evidence, only *Ta'zeer* can be imposed.
- \* Imposed at the discretion of the *Qadhi*, on the basis of public interest when the victim or heir waves retaliatory punishment (*Qisas*).
- \* All other offences for which *Hadd* or *Qisas* cannot be imposed.

There are differing views as to the maximum amount of lashes that can be imposed in terms of this form of punishment. The Shafi'i School states that the maximum is 39 lashes, whilst the Hanafi School is of the view that the number is 75. Imam Malik states that the number is unlimited and may even exceed the maximum that can be imposed for *Hadd* offences, namely, 100 lashes. (Bassiouni, 1982:216). Imprisonment is usually only resorted to when lashes have failed as a deterrent (Bassiouni, 1982:216).

Exile from the offender's place of residence as a form of

punishment, is prescribed for offences like forgery and fraud. Such exile is pre-determined in aspects like location and duration and usually occurs under strict supervision (Bassiouni, 1982:217).

The following are considered to be mitigating factors and should be considered before Ta'zeer punishment is imposed:

- \* the nature and gravity of the offence;
- \* personal circumstances of the offender; and
- \* physical and psychological condition of the offender.

The following can be considered as aggravating factors:

- \* repetition of the same offence; and
- \* recidivism. (Bassiouni, 1982:222 & 223).

If it is discovered that Ta'zeer punishment was imposed on an innocent person, the Islamic State is liable to compensate such person (Bassiouni, 1982:233). Such compensation usually takes the form of a financial settlement. Western penal systems usually do not make provision for compensation in this regard.

### **3.6 PUNISHMENT: SINS AND CRIME**

The nature of the punishment for sins and crimes in terms of the *Shari'ah* also differs markedly. According to Karim (1939:511) there are two sins which Allah will not forgive, namely, a Muslim who leaves the fold of Islam to embrace another religion and a Muslim who intentionally kills another person.

In terms of the *Shari'ah*, man's existence is subject to three specific worlds, each with its unique time frame. Firstly, the present mundane world in which each individual has a fixed lifespan. This is the testing ground for individuals, where their actions will determine the nature of their existence in the worlds thereafter. (Thanwi, Undated:42). It is in the Hereafter

that the phenomena of sin and crime has significance; the difference being that individuals are punished for crimes in this world and for sins in the Hereafter.

Secondly, once the individual dies, his soul goes into the next world called the *Barzakh* or Purgatory. Here the individual's soul is in suspension pending a final destination. Once a sin is committed in the tangible world, its reflection is immediately projected into the *Barzakh* to be recorded and preserved. If the sin amounts to a crime as well, the offender will be punished in the mundane world if the crime is detected.

Lastly, on the Day of Judgment the deeds that were recorded in the *Barzakh* are revealed to each individual concerned. Reward is given for good deeds, whilst punishment is imposed out for wrongful deeds. Individuals are only punished for sins which they committed of their own free will. Thus acts in the mundane world will determine whether or not they will be punished or rewarded (Thanwi, Undated:42 & 43).

The Prophet has reportedly said: "This world is a cultivating ground for the Hereafter" (Thanwi, Undated:45). The *Quran* (Surah 3:Verse 30) has this to say about the Day of Judgment: "On the day when every soul will find itself confronted with all that it hath done of evil. (Every soul) will long that there might be a mighty space of distance between it and that (evil)."

Allah can if He so wishes, pardon the offender for any sin he committed (Thanwi, Undated:48 & 49). Offenders thus have a greater chance of being pardoned for their sins in the Hereafter than for their crimes in this world.

#### **3.7 SUSPENSION/REMISSION OF PUNISHMENT AND PARDON**

In the Islamic Penal System, especially as far as *Hadd* penalties are concerned, the notion of pardoning offenders by the Head of

State is alien. Only the victim has the right to pardon the offender where *Qisas* punishment is prescribed. In cases of murder the heirs of the victim may also pardon the offender by waiving retaliation and payment of *Diyya* (*Quran, Surah 2:Verses 178 & 179*).

The above position applies to *Hadd* and *Qisas* penalties but not *Ta'zeer* punishment, in which case the Islamic Ruler does have the right to pardon the offender (*Khan, 1978:268*). The *Shari'ah* specifically excludes the right to pardon offenders committing *Hadd* offences since they are directed against Allah Himself.

Allah states in the *Quran* (*Surah 62:Verse 12*) that He is forgiving and merciful and will forgive sins if there is true repentance on the part of the offender. However, this act of forgiveness relates only to punishment imposed in the Hereafter in respect of sins committed by an individual.

The Head of the Islamic State is not empowered to pardon the offender of a crime involving *Qisas*, whilst the operation of any *Ta'zeer* punishment may be suspended or remitted by the *Qadhi*. (*Shaheed Vol. 1, 1987:173*).

### **3.8 RESTRICTIVE EVIDENTIARY REQUIREMENTS**

The *Shari'ah* contains numerous restrictions regarding evidentiary requirements which are unknown in Western and other non-Muslim legal systems. Although a large number of these restrictions apply to civil cases, only those relating to the Islamic Penal System will be discussed.

Rules of evidence (*bayyina*) are contained in both *Quranic* injunctions and the *Sunnah*. Schacht (1986:192) states that the most important form of evidence presented in court is *viva voce* testimony, whereas circumstantial evidence is not normally admissible unless so allowed by the *Qadhi*, at his discretion or

when *Ta'zeer* offences are in issue. Written statements can only be used to refresh the memory of the author and is not admissible in isolation.

Evidence must be given under oath, whilst an accused can also make admissions (*igrar*) of certain facts which are in dispute, and in such case no further evidence need be presented to prove those facts (Ajijola, 1983:133).

The *Quran* (*Surah* 65:Verse 2) confirms the requirement of at least two witnesses in criminal cases before a conviction for a *Hadd* or *Qisas* offence can ensue: "And take for witnesses two persons from among you, endued with justice, and establish the evidence (as) before God" According to the following statement in the *Quran* (*Surah* 24:Verse 4) the evidence of four male witnesses is required to substantiate a charge of adultery or fornication: "And those who launch a charge against chaste women, and produce not four witnesses..."

Once a witness is called upon to present evidence it is incumbent on him to do so due to the following *Quranic* (*Surah* 2:Verse 282) injunction: "The witness should not refuse when they are called on (for evidence)" It is a punishable sin to conceal evidence once a potential witness is called upon to present such evidence.

However, the philosophy underlying the presentation of evidence in terms of the *Shari'ah* is that it is preferable to conceal evidence of minor offences if not called upon to divulge it (Siddiqi, 1988:44). The aim is to protect the character of the offender; however, it should be remembered that the offender remains punishable in the Hereafter, so the respite is but temporary.

In cases of theft, the witness is obliged to give evidence as to the ownership of the stolen item since the owner must be protected against alienation of his property. It is however, only required of the witness to mention that the goods have been



"taken" and not "stolen". Thus no criminal sanction would automatically follow since only civil liability is occasioned by this utterance (Siddiqi, 1988:44). Consequently the *Hadd* punishment for theft cannot be imposed unless the word "stolen" is mentioned or implied.

A person who has previously been found guilty of perjury is incompetent to give evidence in a criminal trial, whilst a son may not give evidence against his father nor a grandson against his grandfather, because of the close relationship between them (Siddiqi, 1988:46). Hearsay evidence is totally inadmissible (Lippman, 1985:52). The evidence of one witness is sufficient for a conviction of a *Ta'zeer* offence.

The testimony of a person who has been convicted of a serious offence is also not admissible in a criminal trial; the same fate befalls that of a gambler and someone who accepts usury. Witnesses who commit perjury during a trial should be beaten and then imprisoned according to Imam Shafi'i, whilst Imam Abu Haneefa is of the view that they should only be publicly disgraced in the area where they are ordinarily employed or resident (Siddiqi, 1988:48 & 49). The purpose of this form of punishment is to prevent others from committing similar offences.

### **3.9 REPENTANCE (TAUBAH)**

It was stated earlier in par. 3.5.1 that under certain circumstances an offender can repent and in this way escape punishment. However, in the application of the *Shari'ah*, repentance relates mainly to punishment deferred to the Hereafter.

There are generally two views regarding repentance within the Islamic Penal System. Firstly, jurists belonging to the Shafi'i and Maliki Schools are of the view that punishment for certain crimes is annulled by repentance. They base their view on

numerous *Quranic* Verses which declare that punishment for sanguinary offences is invalidated by repentance. The Prophet also said: "Repentance makes the sinner innocent." (Shaheed Vol. 2, 1987:48). However, the repentance must occur before the offender is charged, and the victim must be compensated adequately.

The crimes concerned here are those which violate *Allah's* rights and are detrimental to the community, for example, theft and apostasy. Repentance would entail abstinence from committing similar crimes in the future. Furthermore, repentance does not annul punishment for crimes against the individual. The offender must replace the property or restore the victim to the same position that he was prior to the commission of the offence. (Shaheed Vol. 2, 1987:48). Thus this principle only applies to certain *Hadd* and *Ta'zeer* offences.

A contrary view is held by Imams Malik and Abu Haneefa, who are of the view that repentance does not annul punishment, except with regard to sanguinary crimes where the heir can exercise this option (Shaheed Vol. 2, 1987:49 & 50).

#### **3.10 JUSTIFICATION FOR PUNISHMENT**

According to Lippman (1988:81) it is a fundamental principle of the Islamic Penal System that every adult is responsible for his actions and should consequently be punished once convicted. Furthermore, punishment must be meted out consistently, without regard to the sex, class, religious affiliation, language or creed of the offender.

Provision is made by the *Shari'ah* for collective responsibility, specifically with regard to the payment of *Diyya*, where in certain instances it is paid by the family or clan of the offender. The other exception on which there is a difference of opinion is whether the Head of the Islamic State can have *Hadd*

punishment imposed on him. Certain jurists believe that he is so punishable, whilst others are of the view that he is not. Lippman (1988:81 & 82) states that the rationale underlying the latter view is that the harm caused could outweigh the good achieved by such action.

The al-Jabriya (fatalist) School states that individuals do not freely choose their own actions; they have no will or power of choice over their actions. Their behaviour is directed by God and are attributed only secondarily to man. The Mu'tazilites believe that the contrary is true - man is the author of his own actions, both good and bad. Therefore he is punishable for bad deeds and rewarded for good deeds. Man has a choice in all he does (Bassiouni, 1982:171).

On the other hand, the Asharites are of the view that although man has a will, it cannot prevail over the power of God; but man's will propels his own actions. As he exercises a choice before acting, he is punishable for all criminal acts committed by him. (Bassiouni, 1982:172). Generally the Islamic belief is that God is omnipotent and knows all actions people may take, before they actually act. God has endowed man with the ability to reason and allows him to act according to his understanding. Although God knows how man will react, he does not prevail on such person to act otherwise, and consequently man is punishable for his criminal actions in the mundane world and for his sins in the Hereafter.

### 3.11 SUMMARY

Sins are punishable in the Hereafter, whilst those persons committing crimes are punished in the mundane world. There exists a greater possibility that offenders could be forgiven for sins than for crimes. Three types of penalties are available in terms of the *Shari'ah*, namely, Prescribed (*Hadd*) Punishment, Equality of Punishment (*Qisas*) and Discretionary (*Ta'zeer*)

Punishment. Juvenile offenders are generally not subject to these penalties.

The *Shari'ah* views the interests of society above those of the individual - it goes further by viewing offences against society akin to being against Allah. The harsh penalties of the *Shari'ah* can only be imposed once the Islamic State has fulfilled its obligation to create a favourable social and economic environment.

The *Shari'ah* views the aims of punishment as follows: general and individual deterrence by providing that punishment should be inflicted in full view of the public; retribution and reciprocity in order to ensure that the degree of punishment imposed is equivalent to the harm caused; preserving property; protecting the chastity of women; and preserving and protecting life. A system of rewards in the Hereafter ensures that there is a positive incentive for individuals to act benevolently towards their fellow human beings.

Penal philosophy underlying the *Shari'ah* is based on the premise that each individual is responsible and therefore punishable for his actions. This individual responsibility is tempered with clan and family co-responsibility for payment of the *Diyya*. The victim plays an integral role in the punishment process and victim compensation is an essential part of correcting the imbalance caused by the crime.

The Islamic Penal System is unique in relation to other penal systems in that acts of adultery, drinking wine, fornication and changing ones religion, which are not usually viewed as crimes, but at most immoral or socially undesirable acts in Western society, are serious offences. Punishment is only imposed as a last resort, after the primary preventive measures have failed and crimes are nevertheless committed.

## CHAPTER 4 : TYPES OF PUNISHMENT ALLOWED BY THE *SHARI'AH*

### 4.1 INTRODUCTION

The *Shari'ah* is explicit with regard to the types of punishment that can be imposed in terms of its penal system and consequently makes provision for the various penalties within the categories of *Hadd*, *Qisas* and *Ta'zeer*. It is intended that these penalties only become operative once the preventive measures contained in the *Shari'ah* do not succeed in preventing the commission of the offences in question.

These forms of punishment will be discussed under four broad headings, namely, physical punishment (execution, lashes, dismemberment, lapidation and crucifixion), restrictions on freedom (imprisonment and exile or banishment), pecuniary penalties (fines, compensation, penance and seizure of property) and minor penalties (disapproving look, admonition, reprimand, threat, boycott and public disclosure).

Penalties which have a physical nature can be imposed in all three categories, whilst pecuniary penalties can only be imposed in the *Qisas* and *Ta'zeer* categories. Penalties which restrict the freedom of the offender can be imposed in both the *Hadd* and *Ta'zeer* categories. Minor penalties may, however, only be imposed in the *Ta'zeer* category.

### 4.2 PHYSICAL PUNISHMENT

The *Hadd* penalties that constitute physical punishment are execution by beheading, dismemberment, lapidation, crucifixion and beating, whilst the *Ta'zeer* penalties include execution, beating, a disapproving look by the *Qadhi* and a verbal reprimand (Schacht, 1986:175). *Qisas* penalties are also physical in nature and include execution. These physical penalties have their

origin in both the *Quran* and *Sunnah*.

#### 4.2.1 EXECUTION

The death penalty can be imposed for murder, armed robbery and apostasy in the *Hadd* and *Qisas* categories (Siddiqi, 1988:51 & 52). The death penalty can also be imposed as a form of *Ta'zeer* punishment for offences like rape or dealing in harmful drugs (Siddiqi, 1988:52).

Executions are carried out publicly and soon after imposition, to increase its deterrent effect. In Saudi Arabia the death penalty is carried out publicly by means of beheading with a sharp sword (Amnesty International, 1989:199). Other Muslim countries like Pakistan, Iraq, Sudan, etc. utilise forms of execution ranging from hanging to shooting by firing squad.

In exceptional circumstances the death penalty can be imposed as a form of *Ta'zeer* punishment - this position is accepted by all four *Sunni* Schools. The Hanafi School states that in cases of murder where retaliation is not imposed, the death penalty is a competent punishment, especially if there is no other suitable penalty. Imam Malik is of the view that the death penalty can be imposed as *Ta'zeer* punishment in cases where serious offences, like spying for the enemy, have been committed. If there is no suitable punishment for a habitual offender, the death penalty can also be imposed. This view is shared by Imams Shafi'i and Hanbal (Siddiqi, 1988:176). However, despite what has been said above, the death penalty remains an extraordinary form of *Ta'zeer* punishment.

It is recommended that executions take place by means of decapitation with a sharp sword since it is swift and inflicts the least amount of pain. However, if a swifter and less painful method were established, it should be considered. Only the State may carry out executions (Bassiouni, 1982:233). The death penalty can therefore be imposed as a *Hadd*, *Ta'zeer* or *Qisas*

punishment. In terms of the *Shari'ah*, execution must take place soon after its imposition, but must be confirmed by the Islamic Ruler.

There are a number of non-Muslim countries where the death penalty still applies, for example, the majority of states in the U.S.A. (Argus, 26/5/92), Russia (Cape Times, 28/9/91), China and Singapore (Argus, 8/6/91). There are currently one hundred countries world-wide that apply this penalty (Amnesty International, 1989:30).

According to Newman (1985:30), beheading as a form of punishment can be traced back to ancient civilisations in Rome and Greece, although it was usually imposed on war criminals. It was also a sacrificial practice of civilisations like the Teutonic people.

#### 4.2.2 DISMEMBERMENT

The *Shari'ah* prescribes dismemberment only for the *Hadd* offences of theft and armed robbery. Cases of theft which comply with all the *Hadd* requirements can be punished with amputation of the right hand. Thereafter the stump is cauterised and treated with medication to prevent infection. Should the accused again be convicted of theft, his right foot will be amputated. (Siddiqi, 1988:138). This form of punishment has elicited considerable criticism from Amnesty International (Brochure on Torture and the Medical Profession, 1989) and in the U.S.A. (Cape Times, 10/10/91) as being barbaric and archaic.

Should an act of armed robbery only result in violence and not theft, the perpetrator's hand and foot from opposite limbs are amputated and the stumps cauterised (Siddiqi, 1988:141). This is the most severe form of dismemberment prescribed by the *Shari'ah*, and is reserved for what it considers to be one of the most serious offences.

Persons who commit theft as a result of hunger or need are not

subject to this form of punishment since it is the duty of the Islamic State to eradicate poverty and hunger by means of the *Beit ul-Mal* (Bassiouni, 1982:196). Dismemberment cannot be imposed as *Ta'zeer* punishment, but may be imposed in the category of *Qisas*, for example, retaliation for assault.

Amputation is currently practised in Mauritania, Sudan, Iran, Yemen, Saudi Arabia and Pakistan (Amnesty International Newsletter, Dec. 1990).

#### 4.2.3 LAPIDATION

According to the *Sunnah*, the prescribed punishment for married persons committing adultery is lapidation. The requirements for the imposition of this penalty are the following: the accused must be Muslim, sane, married, a free-person (as opposed to being a slave) and have reached the age of puberty (Doi, 1984:238 & 239). This form of punishment has been adopted from the Torah and the Old Testament and is still imposed in Saudi Arabia and Iran. Stoning is only prescribed for the offence of adultery in the category of *Hadd* punishment.

In practice the first stones are cast by the witnesses to the act of adultery and then the *Qadhi*, whereafter the bystanders commence stoning the accused (Siddiqi, 1988:72). Moderate sized stones are used in carrying out this penalty so that death may come as swiftly as possible (Amnesty International, 1989:199). This penalty is only utilised in Saudi Arabia, the Gulf Arab States, Iran, Pakistan and Sudan at present.

Lapidation is one of the oldest forms of popular justice which was imposed collectively by society (Newman, 1985:33). It formed part of the Mosaic Law and was imposed for crimes like blasphemy and idolatry (Newman, 1985:35). It is also mentioned in the Bible (John 8:Verse 7) as a form of punishment for prostitution. Such punishment was prescribed in the Torah and the New Testament, and Islam, claiming to be the final revelation,



continued with this institution on divine prescription. Newman (1985:35) states that stoning was also frequently imposed during the Inquisition which occurred during the Middle Ages.

#### 4.2.4 CRUCIFIXION

This form of punishment is prescribed for theft in the Old Testament and has its origin in Roman Criminal Law (Von Hentig, 1937:58). Crucifixion is one of a number of penalties that can be imposed for the crime of armed robbery, depending on the seriousness of the offence, for example, if someone is killed during an act of armed robbery (Siddiqi, 1988:141). After the offender has been executed, his body is placed in a crucifixion-like position for the purposes of displaying it in public. The purpose of crucifixion is to publicise the punishment for this offence. This punishment is prescribed in Verse 33, Surah 5 of the *Quran*.

According to the Maliki School it is peremptory for crucifixion to be imposed if a death results from an act of armed robbery. But in instances where no death occurred the *Qadhi* has a discretion to impose either crucifixion, execution or dismemberment. Furthermore, if no death occurred, but the offender terrorised his victims, the *Qadhi* can also impose crucifixion. If the perpetrator kills with the intention to steal he can be crucified. (Doi, 1984:252 & 253).

Those who committed murder without having taken part in the theft are only executed without being crucified (Siddiqi, 1988:144). Crucifixion can only be imposed as a form of *Hadd* punishment. There is no record to indicate that this penalty has never been imposed in an Islamic State.

#### 4.2.5 BEATING (LASHES)

Lashes can be imposed with various degrees of intensity and can vary in quantity (Schacht, 1986:175). As a form of *Hadd*

punishment, beating is imposed for consumption of alcohol, fornication, false accusation of *Zina* and adultery committed by an unmarried person (Doi, 1984:238). Lashes are also imposed for numerous types of sexual offences and can be imposed on both males and females.

The instrument used for beating is a stick which is free of knots. The blows must be executed with moderation, i.e. not too heavy or too light and the person being punished must receive the blows on his bare skin. The lashes must not be aimed at the same part of the body, whilst none may be inflicted on the face, chest, head or private parts, according to an injunction by the Prophet (Siddiqi, 1988:83 & 84). The lashes are not, as is commonly believed, inflicted with a whip, but instead with an instrument more akin to a light cane. According to Souryal (1987:433) the lashes must also be implemented without undue delay, after the sentence is imposed.

When lashes are imposed on men, they are expected to stand, whilst women are required to sit. No part of the woman's body may be exposed while the beating takes place and the lashes should not cause open wounds and may not be inflicted at times of extreme temperatures. Beating can be inflicted over a number of days instead of imposing the full quota at a single occasion. Imposition of this punishment depends *inter alia*, on the physical condition of the offender (Siddiqi, 1984:85). The *Shari'ah* prescribes strict conditions for the implementation of lashes which are aimed at removing factors which could aggravate the pain or discomfort caused by its imposition. Extraneous factors like extreme cold conditions could considerably increase the pain suffered by the person undergoing this punishment.

The beating is inflicted by scholars of religion who must do so within the spirit and confines of the *Shari'ah*. This effectively takes the implementation of lashes out of the hands of what could be persons with violent or sadistic inclinations. Instead, Islamic scholars who are ever mindful of the punishment that

awaits them in the Hereafter should they use excessive force, carries out this punishment.

If the offender is seriously ill, the beating is postponed until he recovers. However, if the illness is incurable and severe, a bunch of straws (consisting of one hundred in number) should be struck on his body as a symbolic gesture. Such penalty is imposed in lieu of the beating. The punishment on a pregnant or breast-feeding woman is postponed until after the baby is weaned (Siddiqi, 1988:86).

A ruling (*Hadeeth*) of the Prophet related by Imams Muslim and Bukhari state that the imposition of more than ten lashes, other than in cases of *Hadd* punishment was forbidden. A further *Hadeeth* related by Imam Baihaqi, states that someone who imposes lashes in excess of the maximum allowed by *Hadd* punishment, is a transgressor. However, it is held that the application of the first *Hadeeth* has been abrogated since the companions of the Prophet, namely, Caliphs Omar and Ali imposed more than ten lashes in the case of *Ta'zeer* punishment, with no objection forthcoming from the two other companions of the Prophet. According to Islamic jurists Ibn Taimiyya and Ibn al-Qayyim this *Hadeeth* only applies to offenders who are closely related to their victims, like father and son, master and servant, etc. (Siddiqi, 1988:173).

In cases which are not of a private nature, but involves the State or an individual, the *Qadhi* is not bound by this limit of ten lashes for *Ta'zeer* punishment (Siddiqi, 1988:173 & 174). The *Shari'ah* draws a distinction between instances of conflict which have a private or personal nature and others which affect members of the public.

The Maliki School has never accepted the second *Hadeeth*, and those Schools which did accept it as authentic, interpreted it in different ways. Amongst the ways that this *Hadeeth* was interpreted was that when an act that amounted to a *Hadd* offence

was incomplete so that a *Hadd* penalty could not be imposed, then up to one hundred lashes as *Ta'zeer* could be imposed. A view that is also held by some jurists is that the minimum number of *Ta'zeer* lashes that can be imposed is three, although this view does not have unanimous acceptance amongst the jurists of the four *Sunni* Schools (Siddiqi, 1988:174 & 175).

Lashes could have fatal consequences for the recipient, depending on the severity of the blows, the number of lashes inflicted and the physical or mental condition of the person on whom it is imposed. The son of Caliph Omar was convicted of fornication and sentenced to one hundred lashes. The conviction resulted from a confession by the accused and, at his insistence the full amount of lashes were imposed on one single occasion; an act which ultimately resulted in his death (Doi, 1984:241). It was specifically to prevent a similar outcome that the safeguards mentioned earlier were established. Nowadays it is expected that a medical assessment be obtained before lashes is imposed.

According to Kittrie (1971:615) the intensity of the lashes in each case is regulated by the *Shari'ah*; it also varies depending on the seriousness of the offence for which it was imposed.

Flagellation as a form of punishment had its origin in early Christian practices. It was meted out mainly in two forms: for serious offences the lashes were inflicted on the back of the offender, whilst for minor offences it was inflicted on the buttocks (Newman, 1985:85).

#### 4.3 RESTRICTIONS ON FREEDOM

The *Shari'ah* permits only two forms of punishment that result in restrictions on the freedom of an accused, namely, imprisonment and banishment or exile. However, the practice of imprisonment in the Islamic State differs significantly from that which occurs in non-Muslim countries. Banishment is unknown as a form of

punishment outside of Islamic States. This last-mentioned form of punishment also has many variations within the *Shari'ah*.

#### 4.3.1 IMPRISONMENT (AL-HABS)

Imprisonment is mainly imposed as a coercive measure in order to induce repentance (*taubah*) in the offender or ensuring the he performs a specific task (Schacht, 1986:176). There is a marked distinction between the system of imprisonment in non-Islamic countries and that in terms of the *Shari'ah*. This is manifested in the conditions prevailing in the respective prisons since the *Shari'ah* recognises that a prison is not the ideal vehicle to rehabilitate an offender.

The punishment of imprisonment in the *Shari'ah* is only explicitly found within the *Ta'zeer* category (Doi, 1984:224). Later interpretations have linked imprisonment as a form of *Hadd* punishment with regard to armed robbery and apostasy, where banishment is interpreted as meaning imprisonment. It can also be imposed in the *Qisas* category where retaliation is not requested by the heirs; albeit as a form of *Ta'zeer* punishment.

Another purpose of imprisonment in terms of the *Shari'ah* is that it acts as a place of detention so that society can be protected from dangerous criminals. The philosophy underlying imprisonment in terms of the *Shari'ah* is that it could act as a means of atonement, while at the same time punishing the offender by restricting his freedom.

Imprisonment can be imposed in one of two ways: a fixed term or an indefinite term. The former type of imprisonment is utilised for minor offences, whilst the latter is reserved for serious offences (for example the prescribed punishment for women convicted of apostasy) (Siddiqi, 1988:170). According to Ibn Qudaimah (Undated:347 & 348) the minimum period of imprisonment is one day.

#### CHAPTER 4 : TYPES OF PUNISHMENT ALLOWED BY THE SHARI'AH

The Maliki, Hanafi and Hanbali Schools are of the view that there is no maximum term of imprisonment, as each case is dealt with on its own merits (Abu Ya'la, 1938:263). However, Anderson (1959:23) states that maximum periods are prescribed as follows: Imam Abu Haneefa- 2 years; jurists of the Shafi'i School- 4 years; and Imam Malik -5 years. Imam Shafi'i states that the maximum period of imprisonment is one month, if the purpose is to facilitate investigation of an alleged offence, and six to twelve months as a form of punishment. Imam Shafi'i bases his view on the analogy that the term of banishment as a *Hadd* punishment for adultery is one year. (Siddiqi, 1988:171). The practice of imprisonment therefore differs from one region to the next, depending on the school of jurisprudence that prevails.

Siddiqi (1988:171) states that imprisonment can be imposed as punishment on its own or as an additional penalty, depending on the prevailing circumstances.

An indefinite term of imprisonment can be imposed on habitual offenders who in the view of the *Qadhi*, cannot be rehabilitated by any other form of punishment. This term of imprisonment usually terminates either on the death of the prisoner or the date on which he is deemed to be reformed, whichever occurs soonest. (Siddiqi, 1988:171 & 172). This form of imprisonment is also utilised as punishment for offences of apostasy when the accused is female, according to Imam Abu Haneefa.

Unannounced visits to prisons by jurists and *Qadhis* are carried out to ensure that prisoners are not ill-treated or tortured. In terms of the *Shari'ah*, *Qadhis* are in control of the prisons within the area of their jurisdiction. Food, clothing and medical care are provided for prisoners since by incarceration the authorities have deprived them of the means to earn a living. Prisoners' rights regarding life, mental health, beliefs and dignity are to be protected by the authorities whilst they are imprisoned. (Bassiouni, 1982:235).

According to Bassiouni (1982:235) jurists of the four main *Sunni* Schools are of the view that married prisoners (male or female) should be allowed conjugal visits by their spouses in order to prevent homosexuality - this practice of conjugal visits is currently practised in Saudi Arabia.

Prisons resemble dwellings rather than sterile dormitory buildings, since one of the objectives of imprisonment is to prevent the prisoner from causing further harm to others. Therefore the prison should resemble a dwelling so as to prevent possible psychological damage to the prisoner, which may manifest itself in further acts of anti-social behaviour. The Islamic State usually purchases residential dwellings for the purpose of imprisoning offenders. (Bassiouni, 1982:236). Prisoners are to be treated kindly and respectfully according to an instruction of the Prophet.

Imprisonment is seldom prescribed as a form of punishment in the *Shari'ah* for the following reasons:

- \* The breaking up of the family unit results in undue hardship on innocent persons.
- \* If the offender was the breadwinner, the loss of income could cause his dependents to resort to crime to ensure survival.
- \* The absence of the head of the family could cause or increase delinquent behaviour by family members.
- \* Imprisonment results in a heavy financial burden on the tax-payer.
- \* Imprisonment dehumanises and corrupts people, especially the younger ones.
- \* It leads to unnatural sexual practices.
- \* It could result in first offenders developing into recidivists.
- \* It has failed to prevent the commission of serious crimes.
- \* It presents a breeding ground for new criminals.

- \* Its effectiveness in reducing the crime rate is questionable. (Bassiouni, 1982:200 & 201).

According to the Hanafi School, since the State deprived the prisoner of his freedom, he became the ward and thus the responsibility of the State (Bassiouni, 1982:202). The Prophet also regularly enquired about the well-being of prisoners and allowed them to lodge complaints with the Imam about adverse conditions.

Caliph Omar and those Muslim Governors who succeeded him, purchased residential dwellings to serve as prisons. Most jurists are of the view that imprisonment for *Ta'zeer* offences can range from one day to life imprisonment. Many jurists argue in favour of indeterminate sentences of imprisonment so that the offender is only released when he is fully rehabilitated. (Lippman, 1988:83). According to Bassiouni (1982:85), Abu Yusuf, one of the senior jurists of the Hanafi School advocated the payment of monthly salaries to indigent prisoners in addition to providing them with clothing.

Periodical imprisonment was also available to suitable candidates, whilst accused who had fixed employment before being imprisoned, were allowed to participate in work-release programmes. The *Shari'ah* courts also allowed accused to be diverted from the criminal justice system if they could be dealt with in some other manner, for example, arbitration or community service projects under strict supervision. Conditional release was also granted to prisoners who manifested signs of rehabilitation. (Bassiouni, 1982:5).

#### 4.3.2 BANISHMENT OR EXILE (*TAGHRIB*)

Exile from the offender's place of residence within the Islamic State is a competent punishment for the offence of armed robbery. This is a discretionary punishment which the *Qadhi* may impose and can take the form of either imprisonment or banishment from the



domicile of the offender to an outlying area. According to Imam Abu Haneefa, imprisonment or exile is not imposed on either male or female fornicators, instead they are sentenced to one hundred lashes.

Imams Shafi'i and Hanbal are of the view that banishment as a form of *Ta'zeer* punishment should not exceed one year, whilst Imams Abu Haneefa and Malik opine that it may well exceed this period (Safwat, 1982:177).

#### **4.4 PECUNIARY PENALTIES**

##### **4.4.1 FINES**

Fines as a form of punishment were imposed after the establishment of the Islamic State during the latter half of the seventh century. It can only be imposed as a form of *Ta'zeer* punishment since *Hadd* and *Qisas* offences make no provision for its imposition. (Siddiqi, 1988:168). There are also certain writers, like Schacht (1986:172), who believe that the *Shari'ah* makes no provision for the imposition of fines. The views of Islamic jurists are divided into three main categories as regards this form of punishment.

Imam Abu Haneefa is of the view that fines are not allowed as a form of *Ta'zeer* punishment in the *Shari'ah* and argues that no person's money or goods may be taken away without a lawful reason for such action (Siddiqi, 1988:168). However, this reasoning could be criticised in that since a fine is imposed by a *Qadhi* after a legal process. Imams Hanbal and Malik state that the *Shari'ah* does make provision for the imposition of fines in the *Ta'zeer* category.

Individual jurists belonging to the Shafi'i and Hanafi Schools also subscribe to this view (Siddiqi, 1988:169). It will be observed throughout the research project that in many instances

individual jurists of a specific School follow the views of another School - this is an example of the tolerance of the views amongst the various schools of jurisprudence.

According to the Hanafi School, the *Qadhi* or Ruler of the Islamic State retains the fine paid by the offender until he has repented. If the offender does not repent after a certain period, the Ruler can order that the money be spent on public necessities, either through the Public Treasury or directly to the public. (Siddiqi, 1988:168 & 169). Strict control is exercised by the authorities in the Islamic State over assets belonging to others, even if they are convicted criminals. Thus the fine is not retained by the State but returned to the offender after his rehabilitation.

Siddiqi (1988:169) states that two noted jurists, namely, Ibn Taimiyya and Ibn al-Qayyim state that both the Prophet and his companions applied this form of punishment and that neither the *Quran* nor the *Sunnah* prohibited its imposition.

The Prophet also imposed fines in cases where the property stolen did not amount to the minimum required for the imposition of *Hadd* and for the offence of failing to pay *Zakaat*. In practice the *Qadhi* decides on the amount of the fine. (Siddiqi, 1988:170). This reason would appear to be sufficient to legitimate fines as a form of punishment, since the *Sunnah* is only second to the *Quran* as a source of Penal Law.

Fines in terms of the *Shari'ah* differ significantly from that imposed in non-Muslim countries, like South Africa and the U.S.A. Firstly, it is usually only imposed if the *Qadhi* is of the view that lashes would be too severe under the circumstances.

Secondly, it is imposed hesitantly because it can lead to abuse as the State authorities could consider it a source of revenue and consequently extend its application disproportionate to its value as a deterrent. Thirdly, if after the imposition of the

fine, the offender's behaviour improves to any marked degree, the fine paid is returned to the offender. Lastly, the State can never appropriate the fine since it is either returned to the offender or spent on public welfare projects, in the event of the offender not being reformed.

#### 4.4.2 COMPENSATION (*DIYYA*)

Although more akin to damages in civil actions, compensation will be discussed here since it is an integral part of *Qisas* punishment. According to Imam Abu Haneefa, full *Diyya* entails the following:

30 she-camels of four years old;

30 she-camels of five years old; and

40 pregnant camels. The equivalent in monetary terms can also be paid (Karim, 1939:497 & 498). The 1989 value of the full *Diyya* in Saudi Arabia was 32 000 U.S.A. dollars.

As the *Quran* has not stipulated the value of *Diyya*, it is to be paid according to the practice of each Muslim country. Caliph Omar allowed *Diyya* to be paid in gold, silver, cattle, goats and clothing (Karim, 1939:504). Nadvi (1980:430) states that *Diyya* can be paid in instalments over a period of three years.

From this amount the *Diyya* payable in other instances could be calculated, for example, the *Diyya* to be paid for physical injuries. According to Karl (1991:163) the respective Islamic authority has to determine the value of the full *Diyya* in each country.

Teutonic laws in the seventh century also offered compensation as an alternative to retaliatory punishment; in certain instances the victim could be compelled to accept the financial settlement (Ives, 1979:3). Payment of the *Diyya* is not only the responsibility of the offender, but also his family or clan. Therefore, if the offender is not in a financial position to pay the full amount, the family or clan must assist, as the ultimate

responsibility for its payment rests with the last-mentioned bodies.

#### 4.4.3 PENANCE (KAFFARA AND GHURRA)

*Kaffara* can entail either of the following: the freeing of a slave; feeding one meal each to sixty poor people; or fasting for two consecutive months (daily from sunrise to sunset), whilst *Ghurra* is equivalent to 500 Dirhams (the 1991 equivalent value of the Yemeni Dirham was R0,70). Penance is usually paid as a penalty for procuring an illegal abortion and for certain species of culpable homicide.

By prescribing the freeing of a slave as a form of compensation, the *Shari'ah* facilitated the abolition of slavery, a practice which was prevalent in pre-Islamic times. *Kaffara* is also prescribed for transgressing religious duties, for example, breaking of the fast during *Ramadaan* without valid reason.

#### 4.4.4 SEIZURE OF PROPERTY OF AN ACCUSED

Property of an accused can be seized by a *Qadhi* in the same instances where the imposition of a fine would have been appropriate. Instead of claiming an amount of money from the offender, a *Qadhi* can order that the property of the offender be retained until his rehabilitation. Thus money could be substituted by the property of the offender and could be applied in cases where the offender does not have any liquid capital, but owns disposable goods. (Siddiqi, 1988:170). This broadens the application of this form of pecuniary penalty and extends the ambit of pecuniary penalties as a form of punishment.

There is a dual reason for linking the fine to repentance of the offender, and that is firstly, to improve the chances of rehabilitation of the offender and, secondly to prevent possible abuse by either the Ruler or the *Qadhi* if the money is entrusted to them, in the absence of any control mechanism.

#### 4.5 MINOR PENALTIES

The minor penalties that can be imposed by a *Qadhi* for less serious offences, include the following: admonition, reprimand, threat, boycott, public disclosure and a disapproving look by the *Qadhi*. These are all *Ta'zeer* forms of punishment which can be imposed at the discretion of the *Qadhi*.

##### 4.5.1 DISAPPROVING LOOK BY A QADHI

This is the most lenient form of punishment that can be imposed in terms of the *Shari'ah* and is only intended for very minor offences. It consists merely in the *Qadhi* casting a disapproving look at the offender (Schacht, 1986:175). This is clearly the most lenient form of punishment that can be imposed in terms of the Islamic Penal System.

##### 4.5.2 ADMONITION (AL-WA'AZ)

Offenders are pertinently informed by the *Qadhi* that they committed an offence and warned not to repeat such behaviour. The purpose is either to remind the offender that he has broken the law or to inform him, if he was not aware that his act constituted an offence, that he had erred (Siddiqi, 1988:165). This form of punishment is also of a lenient nature.

Admonition was introduced by the following *Quranic* (Surah 4:Verse 34) Verse: "And to those women on whose part ye fear disloyalty and ill-conduct, admonish them (first)...,". According to this Verse admonition is the first and most basic form of punishment, which could be followed by more severe punishment, if the offender persists in his wrongdoing.

Siddiqi (1988:166) states that the *Qadhi* must be convinced that this penalty is severe enough to prevent the offender from committing further offences.

4.5.3 REPRIMAND (AL-TAWBIKH)

This penalty takes the form of a verbal rebuke by the Qadhi, although the practice has developed that specific words are uttered as a reprimand. Reprimand as a form of punishment is also reserved for minor offences. (Siddiqi, 1988:166). A reprimand as a type of punishment has standard application for minor offences in terms of most Western penal systems.

4.5.4 THREAT (AL-TAHDID)

In this instance a threat of punishment is made to the offender with a view to preventing him from committing further offences. The other form of this punishment is to impose a heavier penalty but to suspend its implementation subject to the offender not committing a further offence. The period of suspension is usually of short duration. In terms of the *Shari'ah*, the threat must be appropriate as a form of punishment and must be sincerely made. (Siddiqi, 1988:166). Warnings are also standard forms of punishment in most Western penal systems, as are suspended sentences.

4.5.5 BOYCOTT (AL-HAJR)

This punishment entails the boycotting a certain activity or person is the penalty usually imposed after admonishing has proved unsuccessful. The Quran (Surah 4:Verse 34) recommends this form of punishment in the following Verse: "Refuse to share their beds." This penalty is a form of economic or social ostracism.

The Prophet imposed this penalty on those who refused to join the army at the time of the battle of Tabuk (Siddiqi, 1988:167). This is also a unique form of punishment that has its origin in the Quran. The offender to be boycotted is declared a *persona non grata* and is ostracised by the community for a specific period.

4.5.6 PUBLIC DISCLOSURE (AL-TASHHIR)

This form of punishment entails the stigmatising of the offender and has its origin in the earliest days of Islam. In practice the offender's misdemeanour is publicised in his area of residence or place of employment. (Siddiqi, 1988:167). Such punishment is ideal for persons who as part of their employment or activities collect money from the public. In this way the public becomes aware of fraudulent collectors.

The element of public degradation contained in this penalty serves to publicize the wrongful behaviour and to humiliate the offender (Lippman, 1985:53). This penalty is also imposed on those giving false evidence in court

4.6 SUMMARY

The Shari'ah permits four types of punishment, viz., physical punishment, restrictions on freedom, pecuniary penalties and minor penalties. Physical punishment is imposed in public under the supervision of the Qadhi. The following kinds of physical punishment can be imposed: execution (beheading with a sword); dismemberment (amputation of the hands or feet); lapidation (only imposed on married adulterers); crucifixion (only imposed for the offence of armed robbery); and beating (lashes inflicted with a light cane). Strict rules apply to the infliction of these physical penalties.

There are only two kinds of punishment which restrict the freedom of the offender, namely, imprisonment and banishment or exile. Since imprisonment is designed to rehabilitate the offender, the structure takes the form of a dwelling and the offender is treated with kindness and consideration. Conjugal visits are allowed to both male and female prisoners. Imprisonment is not imposed very often and consequently the prison population is negligible. It can be imposed either for a fixed or indefinite

term.

Imprisonment as a form of punishment is not favoured by the *Shari'ah* since it loses its effectiveness with time and places too onerous a burden on the State's finances and the family of the offender. Fines do not accrue to the State but are returned to the offender once he is rehabilitated, but should the offender not reform, the fine is used for public benefit projects. If the offender does not have liquid capital, his goods may act as a substitute. *Diyya* can be demanded by an assault victim or the heir of a murdered person, in place of retaliatory punishment.



## CHAPTER 5 : IMPLEMENTATION OF PRESCRIBED PUNISHMENT (*HADD*) [1]

### 5.1 INTRODUCTION

This chapter examines the penalties that can be imposed in the category of *Hadd* punishment. Prescribed punishment is the collection of all offences and its consequent punishment as they are mentioned in the *Quran* and serve to outlaw the contravention of the major rights of man. It is the responsibility of the Imam to carry out Prescribed punishment. Many of these penalties were already imposed for offences during pre-Islamic days in Arabia, for example, crucifixion.

The limits of *Hadd* punishment have been prescribed in the *Quran* and may thus not be altered either by means of legislation or the discretion of the *Qadhi*, since the *Quran* is the primary source of Islamic Law. The main purpose of *Hadd* punishment is to prevent the individual and society in general, from committing crimes. Although the *Sunnah* may explain what the punishment for a *Hadd* offence is, it may not alter the punishment if it is expressly stated in the *Quran*. As the highest form of legislation, injunctions in the *Quran* may not be changed in any way.

Offences resorting under this category of punishment are the following: adultery, fornication and other sexually related offences, false accusation of *Zina* or illegitimacy, apostasy, drinking intoxicating liquor, theft, treason, armed robbery and deserting the battlefield in *Jihad* (holy war). It can be mentioned that the offence of treason is not expressly mentioned in the *Quran*, but is deduced from the contents of certain Verses.

The following *Hadd* offences are discussed in this chapter: *Zina*, *Qadhif* and Apostasy.

## 5.2 UNLAWFUL SEXUAL INTERCOURSE (ZINA)

*Zina* can manifest itself in one of many forms, for example, adultery, fornication, sodomy and bestiality. Both the *Sunnah* and the *Quran* have prescribed rules for the implementation of various penalties for these offences.

Unlawful intercourse can broadly be defined as sexual intercourse between persons not married to each other. According to the *Shari'ah* it is only persons who are married to each other that may indulge in any form of sexual activity (Schacht, 1986:178). The *Shari'ah* has outlawed adultery and fornication and prescribed very severe penalties for its occurrence.

*Zina* could result in the birth of illegitimate children or cause the break-up of stable homes, which could in turn give rise to criminal behaviour (Siddiqi, 1988:34). Many criminals come from broken homes where parental supervision was either absent or of a negative nature.

The various forms that unlawful sexual intercourse can take is discussed hereunder.

### 5.2.1 ADULTERY

#### 5.2.1.1 THE OFFENCE

Adultery can be defined as sexual intercourse between two persons, of whom at least one is married to some other person. The term *Zina* is a generic term which refers to all acts of unlawful sexual intercourse, whether or not the parties were married, and as such it includes both adultery and fornication. For the purposes of this study adultery and fornication will be dealt with separately.

Before a person can be convicted of adultery, certain essential requirements must be met: the party must be sane, adult, free (as

opposed to being a slave), imbued with intelligence, and penetration of the glans must have occurred (Qadri, 1984:118). An attempt at sexual intercourse will not amount to adultery and consequently no *Hadd* punishment can be imposed.

Four adult males must simultaneously witness the actual penetration. Furthermore, all four witnesses must present this evidence in court and must also cast the first stones when the penalty of lapidation is carried out. The accused may also confess to a *Qadhi* at four different occasions.

According to Imam Abu Haneefa and the *Shi'ites*, if the *Qadhi* relies on a confession to arrive at a verdict of guilty, there must be a confession freely made by the accused in which it is admitted that penetration took place. This confession must be repeated four times at different occasions in the presence of the *Qadhi* to ensure that it was freely made. There is a relation between the number confessions and the amount of witnesses required for a conviction on a charge of adultery.

*Zina* is one of the most serious offences as it breaks down the very fabric of the family and eventually that of society. *Zina* is an offence which can lead to divorce, assaults and even murder. (Doi, 1984:236). For this reason, adultery is punishable in one of the harshest ways found in the *Shari'ah*. "Nor come nigh to adultery: for it is a shameful (deed) and an evil, opening the road (to other evils)." (*Quran, Surah 17:Verse 32*).

Al-Bukhari reports that the Prophet had the following to say about adultery: "There is no sin after associationism greater in the eyes of Allah that a drop of semen which a man places in the womb which is not lawful for him." (Doi, 1984:236). It should be remembered that the greatest sin a Muslim could commit was to equate another being with Allah - this sin is called *shirk*. Thus adultery is viewed as the second most serious sin in Islam.

For this reason the Prophet has forbidden the first steps that could lead to adultery, namely, a passionate look at a member of the opposite sex: "Even to look at an unknown woman (with a passionate look) is also a sin." (Doi, 1984:236 & 237). These actions which fall short of sexual intercourse are also punishable, albeit not by *Hadd* punishment.

The *Shari'ah* views this offence as extremely serious since it can lead to jealousy, divorce, illegitimacy, family conflict and the spreading of sexually transmitted diseases (Lippman, 1980:46).

#### 5.2.1.2 PUNISHMENT FOR ADULTERY

Punishment which the *Quran* prescribed for adultery was phased in by various Verses revealed to the Prophet, in very much the same way that drinking liquor was criminalised. This process was necessary since adultery was an accepted practice in pre-Islamic days. The first *Quranic* (Surah 4:Verse 15) revelation was the following: "If any of your women are guilty of lewdness, take the evidence of four (reliable) witnesses from amongst you against them; and if they testify, confine them to houses until death do claim them, or God ordain for them some (other) way."

In terms of this injunction, only women guilty of adultery were punished; the penalty being that they be confined to prison till some definite order is received from the Prophet. The maximum penalty that could be imposed for adultery in terms of this injunction was imprisonment for the natural life of the offender. It is accepted by interpreters of the *Quran* that the words "some (other) way" refers to the imposition of lashes which appears in a later Verse of the *Quran*. (Yusuf Ali, 1986:Footnote 525).

The subsequent Verse that was revealed in this regard was more specific and also brought men within the ambit of the penalty: "If two persons among you are guilty of adultery, punish them both. If they repent and amend, leave them alone: for Allah is oft returning, Most Merciful." (*Quran*, Surah 4:Verse 16). No

specific punishment was stated for this offence, but the Verse that was revealed thereafter was more specific in this regard.

The *Hadd* punishment prescribed in the *Quran* (Surah 24:Verse 2) for adultery in the final revelation was as follows: "The woman and the man guilty of adultery and fornication, - flog each of them with a hundred stripes: let not compassion move you in their case, in a matter prescribed by God, if ye believe in God and the Last Day: and let a party of the Believers witness their punishment." This is the punishment generally prescribed for *Zina*. The reason for public imposition of the punishment is in order that it may act as a deterrent to those who witness its imposition. In addition to the lashes, the accused must be exiled from his domicile for a period of one year (Nadvi, 1989:87). However, according to the *Sunnah* this punishment is only applicable to those persons who are not married.

After this injunction was revealed to the Prophet, he clarified the punishment with the following *Hadeeth* reported by al-Bukhari: "Take from me accept from me, undoubtedly Allah has now shown path for them (adulterers). For unmarried persons (guilty of fornication), the punishment is one hundred lashes and an exile for one year. For married adulterers, it is one hundred lashes and stoning to death." (Doi, 1984:238). This was the final piece of legislation which put the seal on the punishment for adultery committed by married and unmarried persons.

Thus the punishment for unmarried adulterers was prescribed as one hundred lashes and exile for a period for one year, and if the offender was married the punishment was stoning to death in addition to the one hundred lashes. In this instance the *Quran* and *Sunnah* prescribe different punishments for different forms of the offence of *Zina*; the one for unmarried offenders, whilst the other refers to married offenders. The text of the *Quran* was revealed to the Prophet and he was also the person who explained the meaning of the Verses.

The Hanbali School prescribes the most severe punishment for married adulterers, i.e. one hundred lashes prior to lapidation (Safwat, 1982:156). The rest of the Schools and the Shi'ites believe that only lapidation should apply to these offenders since the Prophet had abrogated the imposition of lashes in this regard (Safwat, 1982:156).

Islamic jurists of the four *Sunni* Schools believe that this *Hadeeth* completes the formulation of the punishment for adultery. It has become accepted practice since the time of the Prophet, that married adulterers do not have lashes imposed in addition to the stoning. When the Prophet sentenced two married adulterers, he did not order that they receive lashes before they were stoned. (Doi, 1984:238 & 239). Thus the additional punishment of lashes was abolished.

The Prophet imposed stoning as punishment for married adulterers and adulteresses also after the revelation of the above *Quranic* Verse (*Surah* 4:Verse 16). According to Siddiqi (1988:62) this serves as proof that the *Hadeeth* of the Prophet prescribed the punishment for married persons committing adultery, whilst the punishment prescribed in the above *Quranic* Verse applied to unmarried persons committing adultery.

Certain groups doubted whether stoning was in fact the penalty for married adulterers, since lapidation is not mentioned in the *Quran* and state that it is only mentioned in the *Sunnah*, which is a lesser authority than the *Quran* in the structure of the *Shari'ah*. Numerous debates followed, but there is unanimity amongst the Islamic jurists of the four main *Sunni* Schools and the *Shi'ites* that the punishment for married adulterers and adulteresses is lapidation, whilst the punishment for the unmarried offenders is one hundred lashes, in addition to exile for a period of one year. (Siddiqi, 1988:60).

Since there is no punishment prescribed specifically for married adulterers in the *Quran*, recourse should be had to the *Sunnah*

(Burton, 1990:136). This is in accordance with accepted norms of interpreting the *Shari'ah*. The Prophet interpreted the words "until God appoints a way as", which are found in Surah 4 Verse 15 of the *Quran*, as meaning beating and banishment for unmarried adulterers and stoning for married adulterers.

Imam Malik is of the view that exile as a form of punishment is only coupled to the penalty of one hundred lashes in the case of male offenders, whereas female offenders only have the one hundred lashes imposed on them. Exile means banishment to an area away from the home-town of the offender. Siddiqi (1988:59) states that certain jurists like Zaid bin Ali are of the view that the purpose of banishment can only truly be served by imprisoning the offender.

Imam Abu Haneefa opines that the only penalty applicable to unmarried persons committing adultery, be they male or female, was one hundred lashes. Any further punishment, like exile or imprisonment, was a form of *Ta'zeer* punishment that could be imposed by the *Qadhi* at his discretion. In this way exile could be imposed on both male and female offenders. (Siddiqi, 1988:59). The Hanafi School thus takes a more lenient view in this regard.

All four *Sunni* Schools of Jurisprudence accept the view that stoning is the punishment for married persons committing adultery since they also believe that the Prophet was the most precise interpreter of the *Quran*. The *Caliphs* that followed the Prophet as rulers of the Islamic World also imposed stoning on married adulterers (Siddiqi, 1988:63). Imam Abu Haneefa requires that offenders comply with the following before the punishment of stoning can be imposed: they must be married, sane, Muslim, pubescent and free (as opposed to being a slave) (Doi, 1984:239).

Imam Malik states that a conviction on a charge of *Zina* can only be returned by a *Qadhi* if the female participant to the offence

becomes pregnant and subsequently gives birth to a baby (Coulson, 1969:62). The Malikis thus take an extreme view by requiring that the woman involved in an act of adultery actually become pregnant to substantiate the fact that sexual intercourse took place.

Adultery is also criminalised in the Old Testament: "And the man that committeth adultery with another man's wife, even he that committeth adultery with his neighbour's wife, the adulterer and the adulteress shall be put to death." (Leviticus, Chapter 20: Verse 10). The Torah prescribes stoning to death for adulterers.

Stoning is actually mentioned in Deuteronomy (Chapter 22:Verse 23) of the Old Testament: "If a damsel that is a virgin be betrothed unto a husband, and a man find her in the city, and lie with her, then ye shall bring them both into the gate of city, and ye shall stone them with stones that they die."

It is not uncommon that similar penalties are to be found in Judaism, Christianity and Islam, since Islam was established after these religions and claims to be the final revelation. As such it adopted certain of the existing penalties contained therein. Islam established a system of regulations to be complied with before the penalty could be imposed, especially with regard to evidentiary requirements and grounds of exemption from punishment.

If the accused were Jews or Christians, the Prophet punished them according to the penal laws contained in their respective religious doctrines, i.e. lapidation for Jews and the death penalty for Christians (Burton, 1990:129).

Imam Shafi'i states that married adulterers were not flogged in addition to being stoned since the latter replaced the former and was not meant to be in addition to it (Burton, 1990:137). When Caliph Ali had an offender who had committed adultery, lashed in addition to being stoned, he explained that the lashes was



imposed in terms of the *Quran* and the stoning in terms of the *Sunnah* (Burton, 1977:75).

Most Islamic jurists are of the view that accused should be released once they retract their confession (Siddiqi, 1988:70 & 71). In fact the Prophet recommended that accused be reminded that such option was available to them. However, Safwat (1982:156) states that Imams Shafi'i and Malik are of the view that a single confession by an adult, made freely and voluntarily is sufficient for a conviction and subsequent imposition of the punishment of lapidation.

#### 5.2.1.3 PUNISHMENT IMPOSED ON NON-MUSLIMS WHO COMMIT ADULTERY IN A MUSLIM STATE

Imam Shafi'i and some jurists of the Hanafi School, namely Imams Abu Yusuf and Ahmad (Siddiqi, 1988:67), are of the view that there is no difference between the punishment for either married non-Muslims or married Muslims who commit adultery in a Muslim State. Imams Abu Haneefa and Malik differ from this view and state that this punishment is only applicable to Muslims.

When the Prophet had a Jew and a Jewess stoned for adultery he did so in terms of the provisions of the Torah, which also prescribed stoning to death for married persons committing adultery (Siddiqi, 1988:68). Jews who committed offences within the Islamic State were punished according to the provisions of the Torah.

#### 5.2.1.4 IMPLEMENTATION OF THE PUNISHMENT FOR ADULTERY

Punishment for adultery is severe, especially if the offender is a married person and for maximum deterrent effect the punishment takes place in public. However, should the slightest doubt as to the guilt of the offender exist, *Hadd* punishment cannot be implemented. (Siddiqi, 1988:72) & (Doi, 1984:239). The offence must be proved beyond a shadow of a doubt before the punishment

can be imposed. To the very last minute the accused has an opportunity to retract his confession, if the conviction was founded thus.

The punishment of stoning takes place as follows: the accused is taken to a deserted area where there are no houses or vegetation; the witnesses cast the first stones, which are of medium size; the *Qadhi* then casts his stone; thereafter the bystanders stone the accused until it is clear that the accused is dead. When a woman is stoned she is first placed in a hole up to her waist, according to Imams Hanafi, Shafi'i and Hanbal and the *Shi'ites*. (Siddiqi, 1988:72) & (Safwat, 1982:157). The punishment is not carried out if the witnesses do not throw the first stones (Schacht, 1986:176).

After the accused has been pronounced dead, the body is washed and buried whilst funeral prayers are recited (Siddiqi, 1988:72 & 73). In Islamic States the burial of a corpse takes place within hours of the death (most Islamic States are situated in warm climates which facilitates decomposition). Shad (1986:216) is of the view that in the present day it is accepted that imprisonment replaces banishment as part punishment for adultery in certain circumstances.

Because of the severe restrictive evidentiary requirements, stoning for acts of adultery have very seldom been imposed, and where they have been imposed it was usually as a result of a confession. In the past fourteen hundred years only fourteen cases of lapidation have been carried out in Saudi Arabia, and in virtually all of these cases a conviction was obtained as a result of a confession. Therefore, for all intents and purposes, it serves as a deterrent to the general public residing in a Muslim State. (Muslim Conference, Riyadh:1972). This certainly does not mean that adultery has been eradicated, but merely that the strict evidentiary requirements have virtually rendered lapidation as a mere deterrent, with scant chance of implementation.

It was decided in the case of *Green v Fitzgerald*, 1914 AD 88 that adultery was no longer a crime in South Africa; neither is it a crime anywhere else in the Western world. The trend in most Western countries is to decriminalise offences like adultery and fornication, although it remains morally reprehensible in certain societies.

#### 5.2.2 FORNICATION

##### 5.2.2.1 THE OFFENCE

Fornication can be defined as sexual intercourse between two unmarried persons. Fornication resorts under the genus of *Zina* and is therefore considered a serious offence. The *Shari'ah* states that *Zina* opens the door to other crimes and is therefore a crime against society.

##### 5.2.2.2 PUNISHMENT FOR FORNICATION

The punishment for fornication is contained in *Surah 24, Verse 2* of the *Quran* - one hundred lashes for the guilty party and exile for a period of one year. The punishment is also imposed in public. (Nadvi, 1989:87). The penalty is dual in nature, namely, one hundred lashes and exile from the offender's domicile for one year. Since the *Quran* has clearly stated the penalty, there is no fundamental deviation from it in practice.

Satisfactory evidence of two adult males or a confession by the accused is required for a conviction on a charge of fornication. Should this evidence not be presented, *Hadd* punishment cannot be imposed and instead the *Qadhi* can only impose *Ta'zeer* punishment.

##### 5.2.2.3 MANNER OF IMPOSITION OF THE PENALTY

The punishment of lashes is carried out in the following manner:

- \* a stick without any knots is used to inflict moderate

blows to the body of the accused;

- \* the accused is to be stripped naked and covered only with a loin cloth, provided that women are totally covered;
- \* the lashes must be inflicted on different parts of the body, excluding the head, face and private parts;
- \* the woman is seated, whilst the man stands when the blows are inflicted;
- \* the blows should not be so severe as to cause open wounds;
- \* beating should not occur on days when there are extreme temperatures, either too hot or too cold; and
- \* the accused should only be punished if he is physically in a condition to undergo it. (Siddiqi, 1988:83 - 86).

#### 5.2.3 SODOMY

##### 5.2.3.1 THE OFFENCE

This offence is referred to as *al-Liwat* in Islamic Penal Law. The *Quran* (*Surah 7:Verses 80 & 81*) categorises sodomy as a serious offence: "We also (sent) Lut: He said to his people: 'Do ye commit lewdness such as no people in creation (ever) committed before you? For ye practice your lusts on men in preference to women: ye are indeed a people transgressing beyond bounds.'

The "Lut" that is referred to in the Verse above is Lot of the Old Testament, whilst the people are those of Sodom and Gomorrah. According to Genesis, Chapter 19 of the Bible these cities were destroyed as a result of the immoral activities that regularly occurred as part of their religious practices (Yusuf Ali, Footnote 1049:363).

In two further Verses the *Quran* (*Surah 26:Verses 165 & 166*) declares the following: "Of all the creatures in the world, will ye approach males, and leave those whom God has created for you to be your mates? Nay, ye are a people transgressing (all

limits)!" .

Allah views the crime of sodomy so seriously that He destroyed two cities where such activity was commonplace. The reason for the *Shari'ah* reacting so strongly against this act is because if its practice increased significantly it could lead to a decimation of the population of a country. (Siddiqi, 1988:75 & 76). This is of course a view of what could happen in the most extreme case.

The *Shari'ah* considers sodomy to be a crime in three specific senses:

- \* It is a crime against the natural and physical functioning of man's organs, thus affecting them physically, mentally and morally.
- \* It is a crime against their natural purpose of procreation so that the species of mankind can survive.
- \* It is a crime against women in general since they deprive at least two women of marrying, this is a selfish act which is harmful to collective morality. (Siddiqi, 1988:76).

#### 5.2.3.2 PUNISHMENT FOR SODOMY

The *Sunnah* also prescribes punishment for acts of homosexuality for men in the Hereafter: "One who kisses a boy with passion Allah Most High will punish him for a thousand years in the fire of Hell." Sodomy is punished with *Ta'zeer* according to Imam Abu Haneefa, whilst Imam Hanbal and Imam Malik are of the view that sodomy is akin to adultery and therefore the punishment should also be death by stoning, whether or not the parties were married. They base their view on the following ruling of the Prophet as reported by Tirmidhi: "Whomsoever you find doing the deed of the people of Lut, kill the doer and the one on whom it is done." (Siddiqi, 1988:78).

Imam Shafi'i states that married offenders should be stoned to death, whilst unmarried offenders, should be sentenced to one hundred lashes (Safwat, 1982:158). The Hanafi School is of the view that the appropriate penalty is life imprisonment, whilst repeat offenders should be executed (Safwat, 1982:158). This punishment is not of the *Hadd*, but the *Ta'zeer* category. The *Shi'ites* prescribe the death penalty for both married and unmarried offenders (Safwat, 1982:158).

Imam Malik cites certain rulings of the Prophet where those who were found guilty of committing sodomy were executed on the Prophet's orders (Nadvi, 1989:89). Although the crime of sodomy is outlawed in the *Quran*, no punishment is prescribed for it; therefore one would have to examine the *Sunnah* for the nature of the punishment to be imposed.

The reason why Imam Abu Haneefa prescribes *Ta'zeer* punishment for sodomy is because there was great confusion by the companions of the Prophet (the four *Caliphs*) as to manner of execution. Penalties imposed after the death of the Prophet included being buried alive, burning, stoning and flinging the accused from a high cliff. He states further that the *Hadeeth* quoted by Imam Shafi'i refers to those who commit sodomy and who insist that it is a lawful act which they are entitled to partake in. Siddiqi (1988:78 & 79) is of the view that since there is no mention of any cases of sodomy ever brought before the Prophet, there is uncertainty as to whether he would have imposed the death penalty. This view is contrary to Nadvi's research which yielded cases where the Prophet imposed the death penalty for cases of sodomy.

*Caliph* Abu Bakr stated that the punishment for sodomy was that the accused be beheaded and thereafter his body burnt to ashes; *Caliphs* Omar and Uthmaan declared that the roof of a dilapidated building should be pulled down over the accused; *Caliph* Ali punished those guilty of this offence by burning them alive; Ibn Abbas decreed that they should be thrown from a high cliff; and

Sufyan Thauri stated that the punishment was the same as for adultery in that it was one hundred lashes for the unmarried and stoning to death for married offenders (Siddiqi, 1988:79).

According to Schacht (1986:178), if *Hadd* punishment was not applicable to sodomy then at least *Ta'zeer* punishment was. All the *Sunni* Schools except the Hanafi School, draws an analogy between sodomy and adultery for the purposes of punishment. The Hanafi jurists believe that analogies can only be drawn between *Ta'zeer* and not *Hadd* offences (Kamali, 1991:222).

Although sodomy is still a punishable offence in South Africa, the trend in Europe and the U.S.A. is to decriminalise homosexual acts between consenting adult males. Indications are that in the future, only forced acts of sodomy by adults, or those acts committed with minors, will be punishable in the West. (Burchell & Hunt, 1970:264).

#### 5.2.4 BESTIALITY

Bestiality consists in sexual intercourse by a person with an animal, either *per anum* or *per vaginam*. Both the person or the animal could be either male or female. The act of bestiality is outlawed by the *Sunnah* and is therefor not *per se* a *Hadd* offence.

According to Imams Malik and Abu Haneefa, the punishment for bestiality is *Ta'zeer* and not *Hadd*. Consequently the *Qadhi* enjoys a discretion as to the form and degree of punishment to be imposed. However, Imams Hanbal and Shafi'i are of the view that *Hadd* punishment is applicable and that the accused should be stoned to death. The animal on which the offence was committed should also be killed according to the view of Imams Shafi'i and Hanbal. They further support their view with the following ruling of the Prophet: "Kill the animal and the person who committed sexual intercourse with it." Doi (1984:243) states that most jurists are of the view that the animal should not be killed since it cannot have a guilty mind.

#### 5.2.5 OTHER UNLAWFUL SEXUAL OFFENCES

Intercourse *per anum* between a husband and wife is also prohibited but the punishment is not prescribed. It is also an offence for a man to have sexual intercourse with his wife whilst she is in her menstrual cycle. According to Siddiqi (1988:79 & 80) this position is derived from the tradition of the Prophet in the following statements: "The man who commits such an act with a woman is accursed." and "The one who cohabits with a woman in her menses or commits sodomy with her or goes to a soothsayer and believes him to be true, is a disbeliever in what has been sent down to Muhammad."

The majority of jurists believe that there is no certainty as to the punishment for the last mentioned offences, and, as such *Ta'zeer* punishment is to be imposed (Doi, 1984:243). Lesbian acts are also prohibited according to the *Sunnah* and is punishable with *Ta'zeer*. The *Shi'ites* prescribe one hundred lashes for both married and unmarried offenders, whilst repeat offenders could be executed (Safwat, 1982:158).

Most jurists, for example, Imams Malik and Shafi'i, consider rape to be punishable under the category of *Zina*. Therefore if a married man commits rape or if the victim is married, he is to be stoned to death, whilst if both he and the victim are unmarried, he should be sentenced to one hundred lashes and imprisonment for one year. The *Shi'ites* provide that all rapists should be executed (Safwat, 1982:158). Bestiality and sodomy are not *Hadd* offences, although similar punishments are prescribed for its occurrence.

#### 5.3 FALSE ACCUSATION (QADHF)

The Quran (Surah 24:Verse 4) has rendered it an offence if someone falsely accuses another of fornication, illegitimacy or adultery. The Quran makes special reference to the chastity of



women: "And those who launch a charge against chaste women, and produce not four witnesses (to support their allegations), - flog them with eighty stripes; and reject their evidence ever after: for such men are wicked transgressors;". Thus a double penalty has been prescribed for this offence: firstly, eighty lashes are to be inflicted on the transgressor, and secondly, the accused is debarred from giving evidence in court.

The ratio underlying the criminalisation of this act was to prevent frivolous and unsubstantiated accusations of adultery and legitimacy, which could lead to violent reactions (Khadduri & Liebesny, 1984:229).

Another reason was that it casts doubt on the chastity of women and can also cause ill feelings between families and friends which could eventually lead to acts of violence (Siddiqi, 1988:88 - 90). False accusations of infidelity by spouses against each other are often grounds for divorce.

The Quran (Surah 24:Verses 23 & 24) also prescribes punishment in the Hereafter for slander: "Those who slander chaste women, indiscreet but believing, are cursed in this life and in the Hereafter: for them is a grievous penalty, -on the Day when their tongues, their hands and their feet will bear witness against them as to their actions."

Slander by implication or innuendo is also punishable with eighty lashes - Imams Malik and Hanbal. However, Imams Shafi'i and Abu Haneefa are of the view that such offence is only punishable with *Ta'zeer*, unless the slander is accompanied by *mens rea*. (Doi, 1984:248 - 250). The Quran clearly prescribes *Hadd* punishment of eighty lashes for those who commit this offence.

*Qadhif* cannot be committed between spouses (Schacht, 1986:179). If after receiving the eighty lashes, the accused truly repents, his right to give evidence in court may be restored. However, Imam Abu Haneefa differs from this view and believes that this

right to give evidence in a court can never be restored. (Doi, 1984:248).

If the accusation is levelled against a group of people, only one *Hadd* penalty of eighty lashes is imposed (Doi, 1984:250). The punishment of eighty lashes is carried out in the following manner: the accused need not be beaten on different parts of the body; he must not be stripped naked; the blows are of a lenient grade and normal attire may be worn (Siddiqi, 1988:93 & 94). The lashes are thus imposed under less severe conditions than those for fornication and adultery.

The jurists are all agreed that *Qadhf* is also committed if the false accusation is against a man (Rahman, 1986:776). Unsubstantiated accusations of sodomy are punishable by *Ta'zeer* as are false accusations of Lesbianism. According to Imams Shafi'i and Hanbali and the Shi'ites, the offence can be pardoned by the victims, in which case no punishment is imposed. On the other hand Imam Abu Haneefa opines that pardon is not possible since it is a *Hadd* offence. (Safwat, 1982:159).

#### 5.4 APOSTASY (*IRTIDAD*)

##### 5.4.1 THE OFFENCE

*Irtidad* is derived from the root word *radd* meaning to retreat, retire or fall back from. In its penological perspective it means to abandon the faith of Islam. (Rahman, 1978:9). The apostate is called *murtadd*.

The *Quran* (*Surah 16:Verse 6*) declares it an offence for a Muslim to leave the faith of Islam - this is akin to treason, since being a Muslim in an Islamic State entitles the adherent to numerous privileges, economic or otherwise. It was stated previously that Islam is not merely a religion, but a way of life; one in which the individual is totally involved with the

activities of the community. "Anyone who after accepting faith in Allah, utters disbelief, except under compulsion, his heart remaining firm in faith; but such as open their breast to unbelief, on them is wrath from Allah and theirs will be a dreadful penalty." Although this act is identified as a crime in the *Quran*, no punishment is prescribed for its commission. Once again the *Sunnah* has to be consulted in this regard.

However, the *Quran* (*Surah 2:Verse 217*) does mention that there is punishment for apostasy in the Hereafter: "And if any of you turn back from their faith and die in unbelief, their works will bear no fruit in this life and in the Hereafter; they will be companions of the fire and will abide therein."

#### 5.4.2 PUNISHMENT FOR APOSTASY

Punishment for apostasy is prescribed in a ruling of the Prophet as *Hadd* punishment in the form of the death penalty. All four *Sunni* Schools are agreed on this ruling. (Nadvi, 1989:96). The Prophet is reported to have said: "Whosoever changes his religion (from Islam to anything else) bring an end to his life." (Doi, 1984:266). Thus the *Sunnah* prescribes the death penalty for apostasy. Imam Nasa'i reports that the Prophet ruled: "It is not lawful to shed the blood of a Muslim except where a married person commits adultery, a person who apostises after accepting Islam or one who kills a person." (Siddiqi, 1988:99).

According to Imam Shafi'i, injunctions in the *Quran* can only be abrogated by other Verses in the *Quran*, and not by any other source of law, like the *Sunnah* (Rahman, 1978:59). However, it is possible that the *Sunnah* can explain or expound a Verse in the *Quran*.

Once an accused is found guilty of this offence he is given three opportunities to repent, following which he will be spared execution (Qadri, 1984:123). This is a unique position for a *Hadd* offence, namely, that the accused can escape punishment if

he repents after being charged for the contravention by the authorities.

Apostasy may be committed by words, actions, or a failure to observe certain obligatory religious practices. However, before a conviction can be pronounced the following requirements must be met: the offender must have attained majority, have at least average intelligence and must have acted voluntarily. (Siddiqi, 1988:95).

Since Islam is a complete way of life, those who embrace the religion enjoy the full protection and economic assistance of the Islamic State. Therefore, should they leave Islam to embrace another religion, it would be tantamount to treason, an offence which is punishable with death in terms of most legal systems of the world. (Rahman, 1978:133). This type of offence is also unique to the Islamic Penal System.

No distinction is made between persons who were Muslim by birth or those who have converted to the faith of Islam. It is furthermore of no consequence to which religion the apostate converts to. The person so accused is given a reasonable period, usually lasting a few months, during which his decision can be reconsidered. (Siddiqi, 1988:97 & 98). Should the accused repent, this will be accepted and the punishment is not carried out.

Imam Abu Haneefa states that it is not essential to request the errant person to repent; however, should he so request then three days should be allowed for this purpose, failing which he is executed. According to Imam Malik it is obligatory to request the offender to repent, and if he so repents, it should be accepted that he has not left the fold of Islam. The adherents of the remaining two Schools follow either of the above opinions. (Rahman, 1978:116).

Abu Haneefa states that there is no *Hadd* punishment if the

accused apostises whilst he is under the influence of alcohol, but Imams Shafi'i, Hanbal and Malik disagree (Safwat, 1982:168).

#### 5.4.3 MANNER OF EXECUTION

The manner of execution is beheading with a sharp sword according to a ruling of the Prophet: "... but whosoever changes his religion, kill him with the sword." (Siddiqi, 1988:104 & 105). Here the *Sunnah* specifically mentions the manner of execution. Once the accused has been executed his property is distributed amongst his heirs. However, an apostate cannot inherit from his family during his lifetime. (Siddiqi, 1988:107 & 108).

According to Imam Abu Haneefa and the *Shi'ites*, a woman is not subject to the same punishment as a man; she is imprisoned until such time as she repents. If she does not repent she will spend the rest of her life in prison. However, according to Rahman (1978:66) Imams Hanbal, Malik and Shafi'i opine that women should also be executed if they turn from Islam.

There is agreement amongst all the schools of jurisprudence with the ruling of the Prophet that the punishment for male apostates is death by beheading with a sharp sword (Siddiqi, 1988:111).

A famous *Muhaddith* (expert in the art of interpreting *Hadeeth*), Imam Bukhari recorded a ruling related by Abu Qulaba: "The Messenger did not put to death anyone by way of *Hadd* except for one of three antecedents: a person who commits murder of his own free will shall be killed (so also) a person who commits fornication after marriage or a person who fights Allah and His Messenger and becomes an apostate from Islam" (Khan, 1971:1019). Both the *Quran* and *Sunnah* declare apostasy to be a crime whereas only the *Sunnah* prescribes the punishment for this offence.

The majority of jurists and the *Shi'ites* agree that both male and female apostates should be executed. The *Shi'ites* are of the view that men who are born Muslim are still to be executed even

if they revert to Islam (Safwat, 1982:168).

#### 5.4.4 ARGUMENT FOR THE DECRIMINALISATION OF APOSTASY

S.A. Rahman the retired Chief Justice of Pakistan, a country having a predominantly Muslim population and which practises Islamic Penal Law in its *Shari'ah* Courts, presents an argument for the decriminalisation of apostasy in the *Shari'ah*.

He presents his argument under four specific headings:

##### QURAN

The *Quran* itself laid the basis for the principle of freedom of religion and there was no compulsion on anyone to adhere to any specific religion. All people are free to choose between truth and falsehood; this has also been the position with Islam over the years. Even when Muslim armies conquered non-Muslim States, they never imposed their religion on those under their jurisdiction. (Rahman, 1978:160).

Punishment for apostasy mentioned in the *Quran* pertains only to the Hereafter. As long as the inhabitants of an Islamic State abide by the laws and morality applied therein, they remain free from the threat of punishment. Furthermore, according to the *Quran* the individual has until his time of death to repent. (Rahman, 1978:161).

##### SUNNAH

There is no ruling of the Prophet purporting to be an explanation of a *Quranic* Verse which sanctions the death penalty for apostasy (Rahman, 1978:162).

##### CALIPHS

Although the *Caliphs* prescribed the death penalty for apostasy,

this should be viewed in the light of an absence of such sanctioning thereof in the Quran. There is no authority for any deviation from the Quran. (Rahman, 1978:163).

#### ISLAMIC JURISTS

All four Imams of the *Sunni* Schools of Jurisprudence are *ad idem* that there is no *Quranic* sanction for the death penalty in the mundane world. They are of the view that adherence to a religion must be a purely voluntary act as this would be a more dignified position. (Rahman, 1978:166).

Apostasy as a crime is more in the category of *Huquq Allah* (a crime against the rights of God) than *Huquq al-ibad* (crimes against the rights of mankind). Punishment is imposed in the Hereafter for the former category of offences. A further argument against the traditional position of apostasy is that by imposing the death penalty for this offence, it could result in strained relations between Muslim and non-Muslim States. (Rahman, 1978:167). There is however, no evidence or record that any penalty for the crime of apostasy had ever been carried out against either men or women in a Muslim State.

Karim (1939:510) is of the view that the *Quranic* rule that there is no compulsion in religion indicates that there is *per se* no punishment for apostasy. He states that an apostate is only punished if he joins the enemy camp or joins in a battle against a Muslim State. This action would in any case amount to treason, an offence which is generally punishable.

Many other writers believe that only punishment in the Hereafter is prescribed for this offence by the *Shari'ah* (An-Na'im, 1990:183 & 184). There is no evidence that anyone was ever executed for this offence, neither did the Prophet or the *Caliphs* convict anyone for this offence.

## 5.5 SUMMARY

*Hadd* punishment has its origin in the *Quran* and *Sunnah* and may not be altered in any way. Once the offence has been proven, the *Qadhi* has no alternative but to impose the prescribed punishment. Although apostasy is criminalised in the *Quran*, the prescribed punishment is contained in the *Sunnah*, whilst punishment for drinking wine has been determined by *Qiyas* (analogy). Lapidation is prescribed for married adulterers, whilst unmarried adulterers are punished with one hundred lashes and exile or imprisonment for one year. Those convicted of fornication are punished with one hundred lashes. The punishment of lapidation is not stated in the *Quran*, but in the *Sunnah*, and for this reason there is a measure of controversy surrounding it.

There is no unanimity as to whether or not sodomy is a *Hadd* offence. According to Imam Shafi'i married offenders should be stoned to death, whilst unmarried offenders should be sentenced to one hundred lashes (the same punishment as that prescribed for adultery). The Hanafi School states that life imprisonment should be imposed on these offenders, whilst those who thereafter repeat this offence should be executed.

False accusation of *Zina* or illegitimacy is also unique to this penal system and is punishable with eighty lashes. There is a further penalty that the offender is not permitted to give evidence in court. The majority of Islamic jurists agree that apostasy is punishable with *Hadd* punishment; the prescribed punishment being the death penalty. The manner of execution is beheading with a sword.

The criminalisation of apostasy is not compatible with the principle of freedom of choice of religion, as stated in the *Quran*. Furthermore, no punishment in the mundane world is prescribed for it. It is an accepted practice in Islam that Muslim countries should co-exist peacefully with its neighbours. Surely the act of executing an apostate would detrimentally



affect this relationship; it would also negatively affect its relationship with other religious groups. The most plausible explanation appears to be that only apostates who turn aggressively against the Muslim State are punishable.

## CHAPTER 6 : IMPLEMENTATION OF PRESCRIBED PUNISHMENT (HADD) [2]

### 6.1 INTRODUCTION

In this chapter the balance of the *Hadd* offences, namely, theft, consuming intoxicating substances, armed robbery, treason and deserting the battlefield in *Jihad*, and the prescribed punishment for these offences are discussed. Drinking wine and other intoxicants, like adultery, is not a punishable offence in Western countries. However, the *Shari'ah* has criminalised it since it can lead to the commission of other offences.

The offence of theft and the conditions for the imposition of amputation are analysed, whilst the offence of armed robbery and the numerous penalties that can be imposed are discussed. Although treason is not specifically mentioned in the *Quran*, its criminalisation is deduced from Verses therein. The offence of deserting the battlefield in *Jihad* is also discussed.

### 6.2 CONSUMING WINE (KHAMR) & OTHER INTOXICANTS

#### 6.2.1 THE OFFENCE

It is an offence, punishable with *Hadd* punishment if a Muslim voluntarily drinks an alcoholic beverage. It is an essential requirement of this offence that the drinking must have taken place voluntarily. The act is not punishable if there is an absence of *mens rea*. (Schacht, 1986:179). This offence can manifest itself in two ways: namely, the actual drinking of wine and being in a state of drunkenness.

The outlawing of alcohol in the *Shari'ah* was concluded on a gradual basis. Firstly, it was declared that alcohol had both good and bad qualities, but the bad qualities outweighed the good ones: "They ask thee concerning wine and gambling. Say: 'In them

is great sin, and some profit, for men; but the sin is greater than the profit." (*Quran, Surah 2:Verse 219*). This constitutes the first step in the process.

Secondly, Muslims were forbidden to pray whilst they were under the influence of alcohol. This had a significant curtailing effect on the usage of alcohol since Muslims are required to perform five obligatory prayers a day, the first one at sunrise and the last ending after the sun has set.

Lastly, the drinking of wine was specifically forbidden: "Satan's plan is (but) to excite enmity and hatred between you, with intoxicants and gambling, and hinder you from the remembrance of God, and from prayer: will ye not then abstain?" (*Quran, Surah 5:Verses 90 & 91*).

The Prophet considered wine to be a great source of sin and crime. According to Nadvi (1989:95), in terms of its Arabic context the word "wine" used in the above Verse of the *Quran* includes all other intoxicants not used for medicinal purposes, like, opium, marijuana, mandrax, etc. It is reported that the Prophet also said: " All intoxicants are unlawful of whatever thing a large quantity intoxicates, even a small quantity is prohibited." (Doi, 1989:264). Doi (1989:265) that Allah curses all those who are connected with wine, be they the manufacturer, brewer, seller, advertiser or carrier, in terms of a ruling of the Prophet

According to Imam Abu Haneefa, only the consumption of intoxicants manufactured from grapes are prohibited; other alcoholic drinks can be consumed until they cause intoxication (Lippman, 1985:41).

#### 6.2.2 PUNISHMENT FOR THIS OFFENCE

There is consensus amongst the Schools of Abu Haneefa, Malik and the *Shi'ites* that the *Hadd* punishment for this offence is eighty

lashes after a minimum of two trustworthy witnesses attest to the facts. A confession is not admissible for this offence (Bassiouni, 1982:113). Imams Shafi'i and Hanbal are of the view that the amount of lashes is forty. The *Qadhi* can increase this number, in which event it will then constitute *Ta'zeer* and not *Hadd* (Safwat, 1982:160).

During the reign of the first Caliph, Abu Bakr, the maximum penalty was retained at forty lashes. However, when the incidence of this crime increased, he raised the penalty to eighty lashes after consulting the other three companions of the Prophet. (Siddiqi, 1989:117). However, Caliph Omar imposed eighty lashes on a person convicted of drinking wine (Doi, 1989:265). During the reign of Caliph Omar, all the remaining Caliphs agreed to equate the punishment for this offence with false accusation of infidelity (Shaheed Vol.1, 1987:135).

Imam Malik is of the view that the smell of alcohol on the breath of the accused is sufficient for the imposition of *Hadd* punishment of eighty lashes. However, Doi (1989:265) states that Imam Abu Haneefa and Imam Shafi'i disagree and state that this is not sufficient since other substances may have an aroma similar to that of wine.

Qadri (1984:119) is of the view that the punishment for drinking wine is forty lashes, which punishment could be increased to eighty lashes by means of *Ta'zeer* punishment. The increasing of the number of lashes will depend on the seriousness of the offence, for example, when it is linked to other forms of anti-social behaviour. During the time of the Prophet there was no standard punishment for drinking wine - the maximum punishment was forty lashes. (Siddiqi, 1989:115 & 116).

Caliph Omar was the first to impose eighty lashes as a penalty for drinking wine when it was accompanied by false accusations uttered as a result of the intoxicated state, otherwise if it was only drunkenness, the penalty was forty lashes. Caliph Ali also

imposed forty lashes for this offence (Siddiqi, 1989:118). The lashes are imposed in the same way as those in the case of Zina (Siddiqi, 1989:121).

The following acts are also prohibited: selling wine, giving it as a gift, advertising it and using it as a medicine (Hussain, 1991:57 -67). The majority view appears to be eighty lashes, and since it is a *Hadd* offence the *Qadhi* does not have any authority to increase it further. On the basis of analogy, the penalty for this offence has been equated with the punishment for *Qadhif*.

According to Nadvi (1980:52) the drinking of wine more often than not leads to the commission of anti-social acts, many of which constitute crimes. It also impedes an individual's ability to distinguish between right and wrong and loosens inhibitions resulting in people acting in ways often out of character.

Those addicted to alcohol or drugs are not punished, but are instead treated. They are permitted to consume small quantities of these substances during their treatment programme, if so required. Once they are cured they are liable if they again consume the forbidden substances.

In terms of the provisions of Act 1 of 1988 (Criminal Law Amendment Act), any person who knowingly consumes an intoxicating substance and commits a criminal act thereafter whilst his faculties are impaired, is nevertheless guilty of the commission of the act and is punishable as if he were sober, provided that the death penalty cannot be imposed in such case. The court in finding the accused guilty in the above circumstances may furthermore determine that the consumption of the intoxicating substance was an aggravating factor.

With the promulgation of this law the legislature intended to address the situations where dismay was expressed by the general public when offenders were either acquitted of committing offences by reason of the impairment of their faculties resulting

from the intake of an intoxicating substance or in cases where such consumption acted as a mitigating factor.

### 6.3 THEFT (*SARIQAH*)

#### 6.3.1 THE OFFENCE

In the following Verse of the *Quran* (*Surah 2:Verse 188*), Allah prescribes the basis for the right to and protection of ownership of property: "Do not devour one another's wealth by false and illegal means." The property of a person is sacred and may not be taken from the owner without the required consent.

The Prophet in his farewell message also emphasised the right to possession and protection of ones property: "Your lives and properties are forbidden to one another till you meet your Lord on the Day of Resurrection" (Doi, 1984:254). Theft is classified as a crime against society since it disturbs the public peace (Nadvi, 1989:91). Both the *Quran* and *Sunnah* declare theft to be an offence and *Hadd* punishment is prescribed for it.

Hereunder are the essential elements of the crime of theft:

- *contractatio* (removal of the property);
- *mens rea* (blameworthy state of mind);
- the victim should be the legal owner of the property stolen;
- the stolen property should have been removed from the owner's possession;
- the thief should take possession of the stolen property; and
- the property should not be less in value than the *Nisab* (i.e. a quarter Dinar). (Doi, 1984:254 & 255).

According to Whitaker's Almanac (1992:883) the Yemeni Dinar was valued as R5,00 during 1991 (Yemen was part of Arabia before independence).

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Before the Hadd penalty becomes applicable the above requirements

must be met, otherwise only *Ta'zeer* can be imposed. The most important element of the crime of theft is the intention to steal, without which the offence cannot be established (Siddiqi, 1988:127).

Proof beyond a shadow of a doubt is required for a conviction on a charge of theft. The evidence must consist of the eye-witness testimony of at least two reliable adult witnesses. The accused can also confess to committing the crime.

The *Shari'ah* also draws a distinction between theft and wrongful appropriation. Whilst theft is the clandestine wrongful seizure of someone else's property, wrongful appropriation is the open taking of property by suppressing the right of possession of the lawful owner. Civil remedies like set-off, self-help and others are available to those who have their goods wrongfully appropriated. (Amin, 1983:11 - 18). The Islamic State is charged with establishing a climate that discourages crimes of dishonesty before it can implement *Hadd* penalties for theft (Nadvi, 1989:192).

#### 6.3.2 PUNISHMENT FOR THIS OFFENCE

The *Quran* (*Surah* 5:Verse 41) describes the following *Hadd* punishment for theft: "As to the thief, male or female, cut off his or her hands: a punishment by way of example, from God, for their crime; and God is exalted in power." Thus the penalty for theft is stated clearly and unambiguously and therefore accepted by all the schools of jurisprudence and the *Caliphs*.

Imam Abu Haneefa takes a more lenient view regarding the punishment for theft, he goes even so far as to recommend *Ta'zeer* punishment for theft instead of *Hadd* (Nadvi, 1989:92). However, since it is a *Hadd* offence, no one may reduce or increase the prescribed punishment.

In Biblical times and especially at the time of Jesus, the



punishment for theft was very severe, i.e. crucifixion (Matthew, Chapter 27: Verse 38). The purpose of cutting off the offender's hand was to act as an individual and a general deterrent and thus ensure a measure of peace in society. According to a ruling of the Prophet a thief : "...is not a believer at the time he is stealing." (Doi, 1984:256).

There are, however, differences of opinion with regard to the minimum value of the stolen item before amputation of the hand of the thief could be imposed. Imam Malik is of the view that the minimum value is a quarter Dinar (R1,25) whereas Imam Abu Haneefa opines that the minimum value is ten Dirhams (the 1991 value of the Dirham of the United Arab Emirates was R0,70) (Whitaker's Almanac, 1992:883). According to Doi (1984:256 & 257), Imam Malik bases his view on a ruling of the Prophet, reported by his wife Ayesha, whilst Imam Abu Haneefa supports his view on a ruling of the Prophet reported by Ibn Abbas.

Imam Abu Haneefa's view that the value of the stolen item should exceed ten Dirhams (R7,00) is the most popular view in the *Shari'ah* (Siddiqi, 1988:126). In cases where there is more than one offender and where the value of the goods stolen was in excess of one quarter Dinar, Imam Malik opines that one hand of each of the thieves should be amputated. However, Imam Abu Haneefa states that this would only be the case if the booty is divided amongst them and each receives an amount which is in excess of the *Nisab*, before *Hadd* punishment will be applied. Doi (1984:257) states that if the share the *socius* receives is less than the *Nisab*, then only *Ta'zeer* punishment is imposed.

Schacht (1986:180) is of the view that *Hadd* punishment will only be imposed if the value of the goods stolen by a group of thieves, divided by their number, is equal to ten Dirhams (R7,00). The stolen goods are returned to the owner by the court if they are still in existence (Schacht, 1986:180). If the offence is incomplete and the owner does not lose his property, the offender can only have *Ta'zeer* punishment imposed on him

(Khadduri & Liebesny, 1984:226).

No *Hadd* punishment is imposed for the theft of musical instruments since they are for idle amusement, or intoxicating liquor because it is not an item that can be possessed lawfully, instead *Ta'zeer* is imposed (Siddiqi, 1988:130). *Hadd* punishment was imposed for stealing an infant slave but not a free infant since the latter could not be owned (Siddiqi, 1988:131).

Before the *Hadd* punishment of amputation can be imposed, it must be established that the offender:

- is sane;
- is an adult;
- is a voluntary offender; and
- must not have committed the theft as a result of hunger.

(Doi, 1984:257). These are further requirements before the *Hadd* penalty of amputation can be imposed.

Siddiqi (1988:123) states that the Prophet said the following about the liability of a person who committed theft: "Three types of persons are exempt from the punishment of amputation of a hand, a child till he attains maturity, a sleeping person till he gets up and an insane person till he regains his senses."

Furthermore, a person cannot be convicted of stealing things which are found in great quantity or which is not worth guarding, like fish, game, reeds, hay, wood, (when found in their natural state or habitat), etc., according to Imam Abu Haneefa. If the property stolen was neither locked up nor guarded personally, *Hadd* punishment cannot be imposed for the theft thereof (Siddiqi, 1988:124). According to Siddiqi (1988:125), partial possession of the stolen property by the thief is not sufficient, he must have total possession of the property before *Hadd* punishment can be imposed

Certain additional requirements concerning the property must also be met before *Hadd* punishment can be imposed. The goods must:

- be in excess of the *Nisab* in value;
- be valuable;
- have been kept in safe custody; and
- be owned by a person.

(Doi, 1984:257). If any of these requirements are not met only *Ta'zeer* punishment can be imposed.

If property is stolen from the *Beit ul-Mal* or if a father steals property from his son or wife, the punishment is only *Ta'zeer*. However, Imam Malik is of the view that if a father steals from his son, *Hadd* punishment must be imposed (Doi, 1984:257 - 259). If a son steals property from his father, *Hadd* punishment will not be imposed, since a father has a right to chastise his child in addition to any other penalty the State may impose (Nadvi, 1989:92).

Once a thief truly repents, he is still liable to be punished, but Allah may forgive him and he may be spared further punishment in the Hereafter. The *Quran* (Surah 5:Verse 42) states: "But if the thief repent after his crime, and amend his conduct, God turneth to him in forgiveness; for God is Oft-forgiving, Most Merciful." The forgiveness referred to in this Verse applies to the Hereafter.

Imams Shafi'i, Hanbal and Malik are of the view that if someone borrows an article and then refuses to return it, *Hadd* punishment is to be imposed, although Imam Abu Haneefa disagrees. The same applies if the thief becomes the owner of the stolen goods through purchasing it or by receiving it as a gift. (Doi, 1984:259). Non-Muslims who commit theft within a Muslim State are also punished with *Hadd* according to Imams Shafi'i, Hanbal and Malik, but Imam Abu Haneefa is of the view that it does not apply.

Imam Abu Haneefa states that the victim must specifically request *Hadd* punishment, otherwise *Ta'zeer* will be imposed. The same applies if the victim thereafter donates the stolen item to the

offender. (Ghanem, 1983:16).

Caliph Omar decreed that the *Hadd* punishment for theft be suspended during a period in which the land was struck by famine. In one instance he ordered that instead of punishing a person who stole as a result of having no food during this period, that he be given two well-nourished camels. This donation was granted since without any food he would in all probability steal again. (Siddiqi, 1988:132). Extraordinary circumstances allowed the Islamic Ruler to suspend the implementation of this *Hadd* penalty.

Furthermore, the punishment of amputation is not imposed if the offence was occasioned by illness or unemployment, since it is the function of the Islamic State to assist individuals under these circumstances (Aznam, 1987:25).

Lesser penalties were also imposed on other persons who were indigent, for example, when a group of slaves were convicted of stealing a camel, Caliph Omar punished them by ordering them to pay a fine equivalent to double the value of the stolen camel, viz., 800 Dirhams (Siddiqi, 1988:132). Since the imposition of *Hadd* punishment for theft, this crime has virtually disappeared in Saudi Arabia and today amputation is rarely imposed (Doi, 1984:260).

For a first offence the accused's right hand will be amputated at the wrist, whilst on a second count of theft the offender's left foot will be amputated. The accused's left hand will be amputated if there is a third conviction. If there are any convictions for theft thereafter, *Ta'zeer* punishment will be imposed. (Qadri, 1984:120). According to Schacht (1986:180) this last-mentioned punishment usually consists of imprisonment until the accused repents.

Once the hand or foot has been amputated the stump is cauterised by a medical practitioner in order that the amputee suffers the least amount of pain and loss of blood in this process (Siddiqi,

1988:138). Although dismemberment is a severe punishment, it is not intended that the accused suffer any more pain than is occasioned by the act of amputation.

Although most Islamic scholars agree that the feet are amputated for a third and fourth offence, some jurists are of the view that for the third offence the accused should be imprisoned till he repents (Lippman, 1988:45).

The *Shari'ah* places a very high premium on the right a Muslim enjoys with regard to his ownership and protection of the ownership of his property. It is because of this emphasis that the *Shari'ah* prescribes very harsh penalties. Non-Muslims resident in a Muslim State also enjoy this protection of their property. Another reason for the harsh penalties is the fear that should this not be so, victims will seek revenge against the transgressors and in this way further crimes could be committed. (Asad, Vol. 3:117).

Asad (Vol. 3:117) is of the view that without this strong deterrent penalty for theft, society would not feel safe and secure and no real freedom will exist. It should be remembered that the *Shari'ah* strives for economic equality and has established the *Beit ul-Mal* to cater for the needs of the less fortunate members of the Muslim State.

One of the main aims of *Zakaat* is to eradicate poverty and thus significantly reduce the incidence of theft and sexual offences (marriage is facilitated since those who do not have sufficient funds to get married are funded from the *Beit ul-Mal*) (Ahmad, 1982:79).

Islam has established for its adherents a complete social and economic scheme in terms of which no person need resort to stealing any object which could be identified as a requirement for his survival. Should he steal items of a purely luxury nature or do so out of an innate evilness, a severe punishment

awaits him. It is against this background that the *Hadd* punishments for theft must be viewed.

The satisfactory submission of the evidence of two adult witnesses or a confession by the accused is required for a conviction. According to Siddiqi (1988:137), the accused could be held in custody until the witnesses are examined if there is a danger that he may influence the evidence submitted by these witnesses, otherwise he will be summoned to appear before the *Qadhi*.

Imam Shafi'i is of the view that true repentance obviates punishment in both the mundane world and in the Hereafter, whilst Imam Abu Haneefa states that repentance only affects punishment in the Hereafter (Khadduri & Liebesny, 1984:230 & 231). Imam Malik is of the view that amputation should be imposed for theft of State or public property as well (Safwat, 1982:162). *Hadd* is not imposed if the thief repents and returns the property to the rightful owner before a charge is laid.

According to the *Shi'ite* doctrine the Imam can prevent amputation and impose another penalty in its place if such action is in the public interest (Safwat, 1982:162). It is clearly the purpose of the *Shari'ah* that the penalty of amputation should only be imposed in a true Islamic State, where the inhabitants are provided with the social and economic security mentioned earlier (Safwat, 1982:162).

#### 6.4 ARMED ROBBERY (*AL-HIRABAH*)

##### 6.4.1 THE OFFENCE

One of the main objectives of the Islamic State in terms of the *Shari'ah* is to afford protection to the lives and property of its subjects. Armed robbery poses a danger to both the life and property of its inhabitants. Not only is it viewed as a serious

crime in terms of the *Shari'ah*, but it is also a grave sin. (Nadvi, 1989:90). Travellers or wayfarers are often the main victims of this crime. However, this crime is not confined to those two categories above, it can be committed anywhere against any person, be it in a town or in the country areas (Nadvi, 1989:90).

According to Doi (1984:250) the purpose of the *Hadd* punishment prescribed in the *Quran* is to achieve, maintain and uphold social and economic justice within the Islamic State.

Armed robbery is related to both theft and homicide and can be committed by an individual or a group of persons, male or female (Doi, 1984:250). The act of armed robbery can range from merely threatening the victim to actually killing him (Doi, 1984:252). It consists in the wrongful removal of property from a person by force, violence or threats thereof.

Travellers and wayfarers are vulnerable to be attacked and robbed since they are usually in places where the surroundings are unfamiliar and there is often no ready source of assistance for them. Because of the unfamiliar surroundings they are also unaware of whom they may approach for help.

There are differences of opinion as to what acts can be regarded as armed robbery. Imam Malik is of the view that this offence can be committed inside or outside a town, although Imam Abu Haneefa states that it cannot be committed within the confines of the town since there people are afforded the protection of the State authorities. Imam Shafi'i takes the middle view by saying that if the State authorities are weak then the offence is capable of being committed inside a town. (Doi, 1984:252).

#### 6.4.2 PUNISHMENT FOR THIS OFFENCE

In the following Verse in the *Quran* (Surah 5:Verse 36), the various forms of punishment that can be imposed for armed

robbery, both in this world and in the Hereafter, are prescribed: "The punishment of those who wage war against God and His Apostle, and strive with might and main for mischief through the land is: execution, or crucifixion, or the cutting off of hands and feet from opposite sides, or exile from the land: this is their disgrace in this world, and a heavy punishment is theirs in the Hereafter."

Allah views this offence so serious that He sees it as a crime against both the community and Himself. According to Siddiqi (1988:140), any attempt to interfere with or overthrow an established Islamic system amounts to a violation of Allah's rights.

However, if the accused truly repents and returns the stolen property to its victim(s), then mercy may be granted to him in terms of the Quranic (Surah 5:Verse 37) injunction that immediately follows the preceding one: "Except for those who repent before they fall into your power: in that case, know that God is Oft-forgiving, Most Merciful."

The repentance and returning of the stolen goods must occur before the victim reports the crime to the authorities (Schacht, 1986:180). If the offender repents and returns the stolen goods (if any goods were in fact stolen), then he is exempt from the Hadd punishment prescribed in the Quran (Qadri, 1984:121). The Hadd punishment is not imposed because the crime is incomplete as a result of the repentance, but Ta'zeer may still be imposed.

According to the four major Sunni Schools of jurisprudence, the variety of penalties for this crime is imposed in the following way:

\* First Category

If only threats to safety occur, without theft or homicide having been committed, Imams Abu Haneefa and



Hanbal and the *Shi'ites* are of the view that exile should be imposed (Safwat, 1982:166).

Imam Shafi'i states that the punishment could be either exile, imprisonment or any other *Ta'zeer* penalty, depending on the nature of the offence. Imam Malik takes a sterner view and states that the penalty should be either execution, crucifixion, amputation of the hand and foot or exile (Safwat, 1982:166).

\* Second Category

If only theft was committed during the act, and the value of the goods stolen exceeds the *Nisab*, then the *Hadd* punishment that is prescribed is amputation of the right hand and left foot of the offender according to the Hanafi School and the *Shi'ites*. The *Hadd* lapses if the limbs have already been lost; Imam Hanbal shares this view (Safwat, 1982:166). Imams Shafi'i and Hanbal state that for a second like offence, the remaining hand and foot should be amputated (Safwat, 1982:166). Imam Malik is of the view that the full range of penalties mentioned in the *Quranic* Verse, with the exception of exile, could be imposed (Safwat, 1982:166).

\* Third Category

If the act entailed only the killing of a person and no theft, then the offender is executed with a sharp sword, not as a form of retaliation (*Qisas*) but as *Hadd* - Hanafi, Shafi'i and Hanbali. The *Shi'ites* state that execution takes place even against the wishes of the heir(s) of the victim (Safwat, 1982:166). Imam Shafi'i states further that the killing should have been premeditated, whilst Imam Hanbal states that it is sufficient if the offender acted recklessly with regard to the consequences of his actions (Safwat, 1982:166 &

167).

\* Fourth Category

Finally, if both killing and theft occurs during the act, then execution takes place and thereafter crucifixion according to Imams Shafi'i and Hanbal (Schacht, 1986:181). Imam Malik is of the view that the full range of prescribed penalties could be imposed. (Safwat, 1982:166).

If one of a group of offenders kills a victim during an act of robbery, the whole group is executed (Siddiqi, 1988:144). The last-mentioned principle is very similar to the doctrine of Common Purpose. The mere banding together with intention to commit robbery is also an offence, but is punishable with *Ta'zeer* punishment. The exile referred to can be implemented in a number of ways, either imprisonment, expulsion from the State, or confinement to a specific district. However, according to Siddiqi (1988:141) if the offender is a citizen of the Muslim State, he will not be expelled from it.

Non-Muslims who commit armed robbery within the Muslim State are liable to the same *Hadd* penalties as Muslims. It also does not matter who the victim is or what his status or station in life is. (Siddiqi, 1988:142). Non-Muslims can be expelled from the Islamic State.

All the accomplices and *socii* that took part in the act of armed robbery, irrespective of the part they played, suffer the same fate as the main perpetrator (Schacht, 1986:181). Qadri (1984:121) is of the view that those falling in the last category should be hanged. However, the *Quranic* Verse in question does not make any mention of hanging, thus it could only be applied as a form of *Ta'zeer* punishment in this instance.

If one of the perpetrators or accomplices is exempt from *Hadd* punishment, due to a factor like minority, then the *Hadd*

punishment will lapse for all. In this instance Ta'zeer punishment will be imposed on those who are punishable. (Schacht, 1986:181). The severity of this punishment will naturally depend on the part played by each individual during the act.

Should the accused not have the intention to steal, he is only punished with Ta'zeer (Safwat, 1982:164). Imam Malik defines this offence very broadly and includes even acts of fraud, despite the fact that no force was used. The Shi'ites also define this offence widely. According to Imams Malik and Shafi'i, an attack on a woman with the intent to rape should be punished with the same penalties applicable to the crime of armed robbery (Safwat, 1982:164).

## 6.5 TREASON / REBELLION (AL-BAGHY)

### 6.5.1 THE OFFENCE

This act is declared an offence in the following *Quranic* (Surah 49:Verse 9) injunction: "If two parties of believers fall to fighting, then make peace between them; but if one of them transgresses beyond bounds against the other, then fight ye (all) against the one that transgresses until it complies with the command of God; but if it complies, then make peace between them with justice and be fair: For God loves those who are fair (and just)". An example of this offence is rising in revolt against the Islamic leader (Safwat, 1982:169). According to Safwat (1982:170) it can occur as a result of force, refusal to obey a lawful order or refusal to pay taxes.

### 6.5.2 PUNISHMENT FOR THIS OFFENCE

Any attempt to overthrow the Islamic State is punishable with death. However, if they repent they will be spared the death penalty but will however, be punished for any other crime they

committed incidental to the act of treason, like murder or theft. (Siddiqi, 1988:143). Treason is defined very broadly in the *Shari'ah*, and in line with other legal systems, it is viewed as a capital offence.

#### 6.6 DESERTING THE BATTLEFIELD IN *JIHAD* (*AL-FIRAR MIN AL-ZAHF*)

A *Jihad* or Holy War takes place under certain conditions, for example, if the existence or safety of the Islamic State is threatened. *Jihad* is a specific type of battle and it becomes incumbent on every able-bodied Muslim male to partake therein. The *Shari'ah* declares it a great sin to desert the battlefield during *Jihad*. A Muslim who dies in such a battle is a martyr. This act is classified as an offence since it endangers the lives of those taking part in the battle. (Doi, 1984:267).

The following Quranic (Surah 8:Verses 5 - 10) Verses apply to this offence: "O ye who believe! When ye meet the unbelievers in hostile array never turn your backs to them. If any do turn his back to them on such a day unless it be in a stratagem of war, or to retreat to a troop (of his own) - he draws on himself the wrath of God, and his abode is Hell, an evil refuge (indeed)!".

Conviction for this offence carries the death penalty and the accused is beheaded with a sharp sword.

#### 6.7 SUMMARY

The *Shari'ah* prescribes forty lashes for those convicted of drinking wine or consuming other intoxicants. The reason for criminalising this act was because it could lead to the commission of other offences like divorce, assault, murder and other violent crimes. Although the punishment for theft is prescribed as amputation of the right hand, there are specific requirements that have to be met before this punishment can be

imposed. The penalty of amputation is viewed as being disproportionately harsh in relation to the offence, in Western countries.

The variety of penalties which are prescribed for the offence of armed robbery reflect the seriousness with which the *Shari'ah* views the protection of life and property. This offence is related to both theft and murder/culpable homicide.' Allah views the offence of armed robbery to be against both society and Himself. Should the act result in the death of the victim without theft having being committed, the offender is executed with a sharp sword. In practice the penalty of crucifixion has never been imposed.

Although the *Quran* does not explicitly mention treason, any attempt to overthrow the Islamic State is punishable with the death penalty. Deserting the battlefield in *Jihad* is an offence also punishable with execution. Treason is treated as a capital offence in many Western countries.

However, the *Hadd* category only criminalises a limited number of offences and its static nature does not permit it to be extended in order to include other offences as well. Thus *Ta'zeer* and *Qisas* penalties make provision for the offences not mentioned within the *Hadd* category.

## CHAPTER 7 : IMPLEMENTATION OF EQUALITY OF PUNISHMENT (QISAS)

### 7.1 INTRODUCTION

The concept of *Qisas* dates to pre-Islamic times and in its ordinary grammatical sense it means making a thing equal to another, whilst in its penological meaning it refers to making the punishment equal to the crime. The law of *Qisas* refers to both the crimes of unlawful killing of human beings and the unlawful infliction of injury on individuals. There are two types of crime in this category of punishment, namely Crimes Against the Life of a Person and Crimes Against the Body of a Person.

During pre-Islamic days in Arabia it was customary to take revenge on any member of the perpetrator's tribe. In this way innocent people were killed since there was no limit on whom revenge could be taken. This resulted in further acts of revenge and eventually a chain reaction caused the deaths of numerous innocent persons. This was one of the problems the *Shari'ah* addressed when the majority of Arabs converted to Islam.

The law of retaliation has its origin in the Torah and was later introduced into the Bible. Islam retained this law in a more comprehensive form and modified it so that punishment could only be imposed on the wrongdoer, whilst introducing the concept of *Diyya*.

Although the decision to impose punishment is left to the victim or heirs of the deceased, the State authorities administer the system, i.e. imposition of the punishment or paying of the *Diyya*. This form of punishment is unknown in Western penal systems, where the State reserves the right to punish an offender even if the victim has withdrawn the charge.

## 7.2 CRIMES AGAINST THE LIFE OF A PERSON

In this category one finds the various types of homicide that can be committed in terms of the Islamic Penal System.

Islam attaches great importance to the sanctity of life and the Quran (Surah 25:Verses 68 & 69) has the following to say about this aspect: "Those who invoke not, with God, any other God, nor slay such life as God has made sacred, except for just cause, nor commit fornication; -and any that does this (not only) meets punishment. (But) the penalty on the Day of Judgment will be doubled to him, and he will dwell therein in ignominy." The fact that the *Shari'ah* prescribes a double punishment on the Day of Judgment is an indication of the serious way Allah views such an offence.

There are numerous other Verses and rulings where the seriousness of wilful murder of a fellow human being are emphasised, for example, "Do not kill a soul which Allah has made sacred except through the due process of law." (Quran, Surah 6:Verse 15). The Prophet stated: "The greatest sins are to associate something or someone with Allah and to kill human beings." (Nadvi, 1989:84). Islam views the protection of life as the ultimate protection of society, since the individual constitutes its basic component.

The Islamic Penal System recognises five types of homicide.

### 7.2.1 MURDER

In terms of the *Shari'ah* murder consists in the wilful killing of a human being with the use of a weapon or an object that could serve the same purpose, like a stone or fire (Siddiqi, 1988:147).

The punishment which the *Shari'ah* prescribes for this world is found in the following Quranic (Surah 2:Verse 178) Verse: "O ye who believe! The law of equality is prescribed to you in the case of murder: the free for the free, the slave for the slave,

the woman for the woman. But if any remission is made by the brother of the slain, then grant any reasonable demand, and compensate him with handsome gratitude." Thus the law of equality is prescribed for the crime of intentional murder. The words "retaliation" and "equality" are synonymous in this context.

However, the term equality is more appropriate since it means that punishment equal to the crime is imposed, and punishment is not merely a retaliatory action to the crime. The aim of the *Shari'ah* is to ensure that only the offender is punished for the crime (Nadvi, 1989:85). Islamic jurists are not unanimous that the law of *Qisas* means that the offender must be killed in the same manner that the victim lost his life. Imam Abu Haneefa is of the view that the offender should be executed in a way permitted by the *Shari'ah* (Siddiqi, 1988:148). Therefore the punishment for intentional killing is death.

According to Imam Abu Haneefa, a man can be sentenced to death even if he killed a slave, but a father is not executed for killing his child. In the last-mentioned situation *Ta'zeer* punishment is imposed. However, should a child murder his father, the law of *Qisas* is applied. Siddiqi (1988:148 & 149) states that a Muslim who kills a non-Muslim is not subject to *Qisas* but to *Ta'zeer* punishment, although Imam Shafi'i disagrees.

Although a dying declaration can be admitted as evidence, for a conviction on a charge of intentional murder, the evidence of two reliable witnesses or a confession by the accused is required (Siddiqi, 1988:149 - 159).

Should they so choose, the heirs of the victim may pardon the offender, in which case the *Qadhi* cannot impose the death penalty. When this occurs the accused will have to pay compensation to the heirs of the deceased and all persons are forbidden thereafter to avenge the death of the deceased. (Siddiqi, 1988:151). Thus the offence is compounded by payment



of *Diyya*. The heirs can also waive payment of the *Diyya*, whereafter *Kaffara* may be ordered by the *Qadhi*.

The purpose of *Diyya* is to prevent the adverse financial consequences occasioned by the death of the victim. This choice is recommended by the *Shari'ah*, where forgiveness has great merit. (Karim, 1939:491). According to Schacht (1986:181) no *Kaffara* is payable for this offence if *Diyya* is paid; but if the heir refuses to accept *Diyya*, then *Kaffara* becomes payable as a form of civil sanction.

Payment of *Diyya* is recommended in terms of the following *Quranic* (*Surah 2:Verses 178 & 179*) Verses: "But if any remission is made by the brother of the slain, then grant any reasonable demand, and compensate him with handsome gratitude. This is a concession and a mercy from your Lord. After this whoever exceeds the limits shall be in grave penalty. In the law of equality there is (saving of) life to you, O ye men of understanding; that ye may restrain yourselves." The choice of either having the accused executed or reprieved and demanding *Diyya* in its stead, rests with the heirs of the victim and not the State.

*Diyya* can be accepted by the heirs of the deceased only when they abrogate their right to demand retaliation (Schacht, 1986:181). At the time this law was propagated by the Prophet, the value of *Diyya* was equal to one hundred camels or one thousand goats or an agreed upon sum of money (Nadvi, 1989:85).

In cases where the murderer cannot be traced, the *Beit ul-Mal* pays the *Diyya* to the deceased's heir(s) and where a group of persons commit the act, all the perpetrators are punished. The person who voluntarily drinks wine before committing the murder, receives the full punishment of the law. Insane persons who commit murder have their *Diyya* paid by their relatives. Should the heirs request that the murderer be executed, he is beheaded with a sharp sword according to Imam Abu Haneefa. (Doi, 1984:234). However, Nadvi (1989:86) states that Imams Malik,

Shafi'i and Hanbal are of the view that the accused should be killed in the same manner that the victim was killed.

Where a group of persons commit an act of murder and one of them is exempted from retaliatory punishment, then all are so exempt, although they have to pay the full *Diyya* (Schacht, 1986:182).

Since the crime of murder is at the same time a crime against society, the *Qadhi* can impose *Ta'zeer* punishment in order to adjust the imbalance caused by the crime. *Ta'zeer* punishment is imposed by the *Qadhi* in addition to the *Diyya*. It could take any form, but in practice it is usually in the form of imprisonment. The *Ta'zeer* punishment which the *Qadhi* often imposes is one hundred lashes and imprisonment for one year. (Doi, 1984:235) & (Nadvi, 1989:86). According to Imam Malik, in the case of intentional killing where retaliation does not occur, the accused is still punished with *Ta'zeer*, which usually entails one hundred lashes and imprisonment for one year (Schacht, 1986:185).

If the victim has two heirs and only one of them waives retaliatory punishment, then execution cannot take place, instead the heirs will share in the *Diyya*. It is only the male heirs that can waive the claim for retaliation. (Doi, 1984:235). The *Diyya* can be paid over a period of three years and the responsibility for its settlement rests with the family or clan of the accused. The 1989 value of full *Diyya* in Saudi Arabia was 32 000 U.S.A. dollars.

Should the murderer request to be executed, the heirs may not demand *Diyya*, as the wishes of the accused take precedence. However, Imams Shafi'i and Hanbal disagree and state that the choice of the heirs have to be carried out. (Bassiouni, 1982:162).

Even if the heirs pardon the accused in a case of murder and refuse *Diyya*, the Islamic State still retains the right to impose *Ta'zeer* punishment, since the State is the protector of the

rights of society (Kamalie, 1991:350). The heirs can also forgive the accused and reach a settlement (*Sulh*) with him in which case no *Diyya* or *Kaffara* is paid (Safwat, 1982:172). This settlement is often arrived at by means of arbitration between the parties (Bassiouni, 1982:163).

#### 7.2.2 CULPABLE HOMICIDE (QATL AL-AMD)

It entails an intentional act causing the death of a person but without the use of a deadly implement (Schacht, 1986:180). In terms of Islamic Penal Law culpable homicide consists in intentionally killing another with an instrument that is not a weapon and which does not generally serve as such, for example, a stick.

According to Imam Abu Haneefa, this form of homicide is punishable with the payment of *Kaffara* of one hundred camels or its equivalent in value, which is payable over a period of three years (Siddiqi, 1988:152). The *Shari'ah* does not allow capital punishment for this offence. If the perpetrator cannot be traced, the *Beit ul- Mal* will pay the *Kaffara*. (Karim, 1939:491). The heirs of the victim can also pardon the offender (*Sulh*) in which case no *Kaffara* is payable (Lippman, 1988:43).

In South Africa the penalties for this offence usually range from a fine to a long term of imprisonment, depending on the seriousness of the offence and the aggravating or mitigating circumstances present (Burchell & Hunt, 1970:391 - 393).

#### 7.2.3 HOMICIDE BY MISADVENTURE (QATL AL-KHATA)

This offence can manifest itself in one of two ways:

- error in objecto

This occurs when the perpetrator makes an error as to the identity of his victim, for example, intending to shoot Y, X

shoots Z by mistaking him for Y (Burchell & Hunt, 1970:141).

- *aberratio ictus*

This occurs when the offender intends his action but another result ensues, for example, a man fired a gun at a target but the bullet ricocheted and killed a bystander (Siddiqi, 1988:152).

The punishment prescribed for this offence is the following: either the freeing of a Muslim slave or fasting consecutively for two months (daily from sunrise to sunset) or Kaffara to be paid within three years. The offender is also prohibited from inheriting property from the deceased. (Siddiqi, 1988:152 & 153). Certain jurists are of the view that only Kaffara of one hundred camels or its equivalent in value is prescribed as punishment for this offence (Kamalie, 1991:222). The heirs can also pardon the offender in which case no penalty applies (Lippman, 1988:43).

In terms of the common law of South Africa, *error in objecto* does not serve to reduce the penalty in a case of murder (Burchell & Hunt, 1970:141). *Aberratio ictus* as a defence will only be valid if the accused could not reasonably have foreseen the deceased's death, although he could be guilty of attempted murder and punished accordingly (Burchell & Hunt, 1970:141). If a reasonable man would have foreseen the death, he would be guilty of culpable homicide.

#### 7.2.4 KILLING BY AN UNEXPECTED ACT (QATL QAIM MAQAM AL- KHATA)

This is purely a form of accidental killing, for example, if a sleep-walker falls on or assaults another person and kills him in the process (Siddiqi, 1988:153). Kaffara of one hundred camels or its equivalent in monetary value is payable. Pardon or *Sulh* can also take place. Such acts are not punishable in terms of South African law (Burchell & Hunt, 1970:102).

7.2.5 KILLING BY INTERMEDIATE CAUSE (QATL BI-SAHAB)

Killing by intermediate cause occurs when a person causes a dangerous situation and does not secure it, resulting in someone getting injured thereby, for example, a man digs a deep hole and constructs no protective measures, whereafter someone falls therein and is killed.

The prescribed punishment for this offence is payment of normal *Diyya* but the offender is not forbidden from inheriting from the deceased (Siddiqi, 1988:153) & (Schacht, 1986:181). However, the accused is not liable if the dangerous construction is situated on his own property (Schacht, 1986:182).

Full *Diyya* referred to above is equivalent to one hundred camels of high quality, whilst the normal *Diyya* is one hundred camels of lesser value. The *Diyya* payable to a woman is half of that for a man (Schacht, 1986:185). Someone who kills an insane person or a pre-pubescent child is liable to pay the full *Diyya* (Schacht, 1986:183).

7.3 CRIMES AGAINST THE BODY OF A PERSON

The law of *Qisas* also applies to bodily assaults according to Surah 5 Verse 48 of the Quran. However, it should be remembered that the contents of this Verse is not to be taken literally as it was written in the figurative sense. It merely means that injury to vital organs is a punishable offence within the *Shari'ah*. (Siddiqi, 1988:154). The *Sunnah* also prescribes *Qisas* as punishment for assault (Karim, 1939:495). However, according to the Law of *Qisas*, the punishment may not exceed the extent of the injury or harm caused by the crime (Safwat, 1982:172).

Later in this Verse the Quran is more specific with the promulgation of the following injunction: "There is retaliation in the case of wounds."

Thus retaliation is allowed to the injured party on condition that the very same injury is inflicted on the offender, for example, if the victim's tooth is broken then he is only justified in having the tooth of the offender damaged to the same extent. However, according to Siddiqi (1988:155), if the corresponding organ of the offender is already damaged or non-existent, then only *Diyya* is payable by the offender is only liable to pay the *Diyya*.

No retaliation is allowed by the *Shari'ah* if the tongue or sexual organ of the victim is damaged, instead *Diyya* is payable. The Prophet has remained silent on the aspect of paying *Diyya* in cases where the victim so elects, and it is the four major *Sunni* jurists in Islam that have established this system. (Siddiqi, 1988:156). Retaliation is only allowed in cases where such action is physically possible (Schacht, 1986:185). By analogy, the *Beit ul-Mal* will pay the *Diyya* if the offender is untraced.

*Qisas* is applicable to wounds caused to the head if the skull has also been damaged, the *Diyya* is five camels. For internal injuries the *Diyya* is one third of the full *Diyya*. If the victim's teeth are damaged as a result of an assault on him, two kinds of *Diyya* is payable:

- *Mughallizah*

Here the *Diyya* is one hundred camels of which forty must be pregnant she-camels.

- *Mukhaffafah*

The *Diyya* is one hundred ordinary camels. If camels are not available then their value in money should be paid. (Qadri, 1984:115). As modern dental techniques were not available in the early days of Islam, teeth were considered as essential as other vital organs.

Full *Diyya* is payable when one of the following organs are injured: both feet; nose and both ears; both eyes; tongue; both

lips; both testicles; and the loss of either the sight, power of expression, capacity to talk, ability to hear, sight, taste, sexual urge, and intelligence (Qadri, 1984:115). As regards the loss of an eye or both eyes, *Diyya* becomes payable because sight is lost. According to Schacht (1986:185) the *Diyya* for a woman is half that of a man.

The full *Diyya* is also payable when both breasts of a woman are destroyed or where the remaining eye of a one-eyed person is injured to the extent that he cannot see (Doi, 1984:234). Half the full *Diyya* is payable when only one hand, one lip, one eye, etc. is injured. When a victim loses all the five senses as a result of an unlawful assault, full *Diyya* is payable. (Siddiqi, 1988:156).

The *Shari'ah* favours the forgiving of the offender and paying *Diyya* instead of effecting retaliation. The *Quran* (Surah 5:Verse 45) encourages forgiveness in the following Verse: "But if anyone remits the retaliation by way of charity, it is an act of atonement for himself."

In instances of injuries for which no specific *Diyya* has been prescribed, *hukuma* becomes due; this is an estimated amount commensurate with the loss suffered by the victim (Schacht, 1986:186). This amount would be determined by the *Qadhi* usually after hearing medical evidence.

Three consequences can thus result from an assault: retaliation, pardon or compensation (Karim, 1939:498). In this regard the *Qadhi* may also call for medical evidence in order to ascertain the extent of the injury. The punishment for unintentional injuries differ in quantum in that lesser *Diyya* is imposed than for the intentional infliction of bodily harm (Shaheed Vol. 1, 1987:141). Imam Malik is of the view that in addition to *Diyya*, the *Qadhi* should impose *Ta'zeer* punishment to cater for the interests of society (Shaheed Vol. 1, 1987:299). The additional *Ta'zeer* punishment is in line with the penalty for murder.

The offender's family or clan is responsible for payment of the *Diyya* or *Kaffara*, if he is not at the means to pay it - this has the effect of community and family pressure on the offender to conform to accepted norms of behaviour (Safwat, 1982:173). It is expected that the family or clan will exert pressure on potential offenders to refrain from criminal behaviour.

#### 7.4 SUMMARY

*Qisas* punishment has its origin in the Mosaic Law but is currently unique to the Islamic Penal System. The victim has the choice of either retaliatory punishment imposed on the offender or to demand *Diyya* in its stead in cases of assault, whilst the heirs of the victim have the same choice in the case of murder.

The ratio underlying *Qisas* punishment is to ensure that the degree of retribution does not exceed the harm caused. The *Shari'ah* prescribes the death penalty as a form of retaliatory punishment for the offender and most of the *Sunni* Schools of Jurisprudence are of the view that the murderer should be put to death in the same way the victim was killed. The heirs of the victim have the choice to have this penalty imposed or to demand the payment of *Diyya* from the offender instead.

In terms of the law of *Qisas* the victim is entitled to request that the authorities inflict the same injury on the offender in the case of an assault. The victim also has the choice of demanding payment of *Diyya* instead. The value of the *Diyya* will vary according to the extent of the injury caused. It is highly recommended by the *Shari'ah* that the victim choose *Diyya* instead of retaliatory punishment.

Imposition of retaliatory punishment thus lies at the instance of the heir or victim, although the State retains the right to impose *Ta'zeer* punishment to protect the interests of society. In the following chapter the penalties for offences not contained



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in the *Hadd* and *Qisas* categories will be discussed.

## CHAPTER 8 : IMPLEMENTATION OF DISCRETIONARY PUNISHMENT (TA'ZEER)

### 8.1 INTRODUCTION

This category of punishment serves as a back-up for the previous two categories where no provision has been made for the criminalisation of certain acts. It also resembles the Western concept of punishment in contradistinction to *Hadd* and *Qisas*. *Ta'zeer* punishment also complements *Qisas* penalties in that provision is made for the protection of the rights of society in cases of murder and assault.

*Ta'zeer* therefore applies to any offence or immoral act which is not criminalised by the former categories of punishment. Although the penalties of dismemberment, crucifixion and lapidation cannot be imposed in terms of this category, all other penalties, even the death penalty can be imposed.

### 8.2 THE PARAMETERS OF TA'ZEER PUNISHMENT

Discretionary punishment has been established to cater for those instances where *Hadd* and *Qisas* do not apply. Certain crimes that are prevalent today were not in existence when the *Quran* and *Sunnah* were revealed, for example, international drug trafficking, computer crime, etc. Thus if the *Shari'ah* were to remain static, the Islamic Penal System would not have developed to encompass these offences as well. The aim of *Ta'zeer* punishment should always be to protect the social order and is to be implemented in the public interest (Shaheed Vol. 1, 1987:178 & 179).

The word *Ta'zeer* has as its root '*azar*', which in Arabic means to prevent, respect and reform. Within its penological meaning it refers to preventing the criminal from becoming a recidivist, by reforming him. (Siddiqi, 1988:158). *Ta'zeer* is not a fixed

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punishment like *Hadd*, but a discretionary one which is imposed by a *Qadhi*. There are no alternatives like *Diyya* and *Kaffara* in this category of punishment. According to Siddiqi (1988:159) *Ta'zeer* is not mentioned directly in either in the *Quran* or *Sunnah*, but implied by certain injunctions and rulings of the Prophet.

The *Quran* (*Surah* 4:Verse 16) identifies certain 'offences for which it prescribes no specific penalty, for example: "If two men among you are guilty of lewdness, punish them both." By the exercise of analogy, this Verse can be viewed as the origin of *Ta'zeer*. Because of limited restrictions and the fact that the system of *stare decisis* does not apply, the *Qadhi* has a great responsibility in exercising his discretion in imposing this category of punishment.

*Ta'zeer* punishment can also be quantified by legislation, but in its absence, the *Qadhi* is empowered to use his discretion (Kamalie, 1991:326). Discretionary punishment is often referred to as penal punishment since it is the category that is closest to the Western concept of punishment. It did not originate in pre-Islamic Arabia, but developed out of necessity to punish actions criminalised in either the *Quran* or *Sunnah* but for which no penalty has been stipulated. During the Umayyad Dynasty, *Qadhis* first imposed this form of punishment for numerous actions that threatened the peaceful existence of society. (Schacht, 1986:207).

This form of punishment has a wide sphere of application since its ultimate aim is to protect the public interest (Shaheed Vol. 1, 1987:143). The *Qadhi's* discretion must, however, be exercised within the parameters of the *Shari'ah*. First offenders of good reputation are often granted indemnity for the commission of petty offences (Bassiouni, 1982:222).

Traces of discretionary punishment are also to be found in the *Sunnah*. In a ruling of the Prophet it was reported that he

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ordered a thief who was convicted of stealing an amount less than the minimum required for *Hadd*, to pay double the value of the stolen item. There was at that stage no rule in Islamic Penal Law which permitted such penalty. The Prophet also declared the offender to be "liable to punishment" and left the imposition of the penalty entirely to the discretion of the *Qadhi*. (Siddiqi, 1988:163). This last statement is also seen as a basis for *Ta'zeer* punishment.

*Ta'zeer* punishment is thus deduced from the *Quran* and *Sunnah* and may either be imposed for certain *Hadd* offences where all the requirements have not been met or for other offences not covered by *Hadd* or *Qisas*. According to Shaheed (Vol. 1, 1987:144) there is no minimum *Ta'zeer* penalty.

In terms of the *Shari'ah* certain conditions apply to *Ta'zeer* punishment:

- \* There is a ruling by the Prophet that the maximum limit for *Ta'zeer* should not exceed that for *Hadd* punishment.
- \* The object with which *Ta'zeer* is imposed must be utilitarian and it should not be imposed as a means of torture under any circumstances.
- \* In imposing *Ta'zeer* punishment, the *Qadhi* should be guided by the spirit and principles of the *Quran* and *Sunnah*.
- \* Establishing *Ta'zeer* offences should have as its motivation, the protection of society.
- \* *Ta'zeer* punishment must be proportionate to the harm caused. (Safwat, 1982:176).

Before imposing *Ta'zeer* punishment the *Qadhi* must fully consider the aggravating and mitigating factors present, whilst the evidence of a single eye-witness or adequate circumstantial

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evidence is sufficient for a conviction.

According to Lippman, *Ta'zeer* punishment is imposed in the following circumstances:

- \* Where the technical requirements for *Hadd* and *Qisas* offences are not met, for example, where full penetration does not occur when the offence of adultery is committed.
- \* Where doubt exists as to the commission of a *Hadd* offence or when specific circumstances, like an act of theft committed between family members occurs. Another example is instances where there is an insufficient number of witnesses to prove a *Hadd* offence (four witnesses for adultery and two for other *Hadd* offences).
- \* Acts prohibited in the *Quran*, but for which no punishment has been prescribed, for example, eating pork, practising palmistry, bribery, etc.
- \* Acts which violate social norms, like dressing in a provocative way, use of obscenities, loud and disorderly behaviour, etc.

Hereunder is a list, although not exhaustive, of offences for which *Ta'zeer* punishment can be imposed and other aspects generally affecting this form of punishment:

### 8.3 USURY (AL-RIBA)

Usury was rendered unlawful as a result of numerous *Quranic* (*Surah 2:Verses 275 - 279*) injunctions: "But God had permitteth trade and forbidden usury." Also: "O ye who believe! Fear God and give up what remains of your demand for usury, if ye are indeed believers. If not, take notice of war from God and His Apostle:"

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In Arabia during the Prophet's lifetime, money-lenders levied exorbitant amounts of interest to those who sought monetary loans. For this reason the charging of interest was made a punishable offence in Islamic Law. However, there is no unanimity amongst the jurists as to what the definition of usury is, therefore the *Qadhi* determines whether the act constituted usury in each individual case. (Siddiqi, 1988:178).

Usury causes unemployment, lower production and increased unit costs (Ahmad, 1982:11 - 17). The reason for the *Shari'ah's* opposition to usury is founded on the fact that someone receives money without having to have worked for it and that it artificially raises the prices of goods.

According to the *Shari'ah*, the person who accepts usury loses his competency to give evidence in a court. The *Qadhi* has a discretion as to the appropriate punishment for this offence, which could range from a fine to lashes or imprisonment, depending on the aggravating or mitigating factors present. (Siddiqi, 1988:179)

### **8.4 FALSE TESTIMONY (SHAHADAT AL-ZUR)**

The *Quran* (Surah 4:Verse 135) has declared false testimony to be an offence in terms of the *Shari'ah*: "O ye who believe! Stand out firmly for justice, as witnesses to God, even as against yourselves, or your parents, or your kin, and whether it be (against) rich or poor; for God can best protect both."

A *Qadhi* has a discretion to impose any appropriate punishment and can also order a measure of redress (Siddiqi, 1988:180). Crimes of this nature are only punishable at the request of the injured party who must further be present at the trial and when the punishment is carried out. If the false testimony results in someone suffering prejudice, the *Qadhi* can in addition to the penalty, impose a sanction of financial redress.

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According to jurists of the Hanafi School, the punishment for this offence is public exposure and a long term of imprisonment. Caliph Omar imposed a penalty of public exposure, lashes and a long term of imprisonment on such an offender (Rahman, 1986:781).

### 8.5 BREACH OF TRUST (*KHIYANAT AL-AMANAH*)

The following two Verses describe the unlawfulness of this offence: "God doth command you to render back your trusts to those to whom they are due; and when ye judge between man and man, that ye judge with justice:" (*Quran, Surah 4:Verse 58*) and "O ye who believe! Betray not the trust of God and the Apostle, nor misappropriate knowingly things entrusted to you." (*Quran, Surah 8:Verse 27*).

Punishment for this offence is a discretionary one imposed by the Qadhi. Siddiqi (1988:180) states that the Prophet equated this offence with theft. However, since it is not a *Hadd* offence, amputation cannot be imposed: although in practice the punishment usually meted out for this offence is lashes or imprisonment.

### 8.6 INSULTS AND VERBAL ABUSE (*AL-SABB*)

"O believers, let not any people scoff at another people who may be better than they; neither let women scoff at women who may be better than themselves. And find not fault with one another, neither revile one another by nicknames. An evil name is ungodliness after belief." (*Quran, Surah 49:Verse 11*).

This type of offence is punishable by discretionary penalty (Siddiqi, 1988:181). The less severe forms of punishment are usually imposed for this offence, for example, a fine.

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### 8.7 BRIBERY (AL-RISHWA)

This act has been declared an offence in terms of the following *Quranic* (*Surah 2:Verse 188*) Verse: "Consume not property between you in vanity, neither proffer it to the judge, that you may sinfully consume a portion of other man's property intentionally."

Since no punishment has been prescribed, the *Qadhi* may punish at his discretion and, as it is a serious offence, the punishment could be either lashes or imprisonment (Siddiqi, 1988:182).

### 8.8 CONTEMPT OF COURT

Any insulting or degrading remark against a *Qadhi*, in his capacity as such, is an offence in terms of the *Shari'ah* (Siddiqi, 1988:183). Evidence will have to be adduced to prove the offence and the *Qadhi* can impose any punishment he considers adequate under the circumstances.

### 8.9 INTRODUCING INNOVATIONS INTO THE SHARI'AH

The introduction of innovations into the *Shari'ah* is an offence for which the *Qadhi* can impose a discretionary penalty. Included in this category of offences are: black magic, sorcery, palmistry, astrology, etc. These offences are usually punished severely and appropriate penalties could include lashes and imprisonment. (Siddiqi, 1988:183).

### 8.10 ABORTION

Abortion is an offence which falls within the categories of *Qisas* and *Ta'zeer*, and therefore merits special attention.



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The *Shari'ah* declares life to be a sacred asset and imposes severe penalties for destroying it without lawful reason (see *Surah 4:Verse 93* above). When it concerns infanticide, Islamic Law becomes very specific in the following Verse of the *Quran* (*Surah 17:Verse 31*) "Kill not your children for fear of want; - We shall provide sustenance for them as well as for you. Verily, killing them is a great sin."

### - The Status of the Foetus (*Janin*) in Islam

Ronald Munson (1983:41) defines a foetus as the stage eight weeks after conception till the birth of the baby. The *Quran* (*Surah 23:Verses 13 & 14*) & (*Surah 22:Verse 5*) view any stage of life after conception until the birth as being a foetus and should therefore be protected until its birth occurs.

The *Shari'ah* states very clearly that the foetus has a right to life. Imam Shafi'i recommends that if a pregnant woman dies, the foetus should be cut from her belly in order that it may have a chance of survival (Ebrahim, 1988:116).

Hereunder are a few practical examples of different types of abortion and the appropriate penalties in terms of the *Shari'ah*:

#### (i) Abortion of a Dead Foetus

The penalty is *Diyya* which is equal to five camels or its equivalent value in money. It makes no difference if the foetus is male or female. This is due to a ruling of the Prophet related by Abu Hurreira. If the person procuring the abortion is an heir, he will not inherit from the *Diyya* of the foetus. (Palmer, 1992:20).

#### (ii) If the Foetus Aborted is Alive but Dies as a Result of the Act Inducing the Abortion

According to Palmer (1992:20) the punishment is retaliation for

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those who act deliberately and full *Diyya* if the act was not deliberate.

- (iii) If the Foetus is Aborted and Lives but Dies from Another Unrelated Act

The punishment is *Ta'zeer* on the person procuring the abortion, whilst the person who kills a live baby commits murder and is punished accordingly, i.e. *Qisas* (Palmer, 1992:20).

### 8.11 RAPE

Different penalties are imposed for rape in the various Muslim countries. Certain jurists reason that since it is not *per se* a *Hadd* offence or one meriting *Qisas*, it must resort under the category of *Ta'zeer*, in which the punishment lies within the discretion of the *Qadhi*. However, an act of rape can also amount to fornication if the parties were unmarried and adultery if at least one of the parties were married; however, the difference here is that the element of coercion is present.

The *Shari'ah* views unlawful sexual intercourse in a very serious light, and there is no doubt that a severe punishment like the death penalty would be imposed on a rapist. In practice the death penalty is imposed as a matter of course in most Muslim countries, for example, Iran and Egypt (see par. 9.3 and 9.8).

According to a noted jurist Al-Dasuki the *Shari'ah* does not view rape as a sexual crime, therefore it does not resort under the category of *Zina*; instead it views it as a crime of violence (Doi, 1984:253). As such, the death penalty should be imposed for this crime since it is an appropriate penalty for the crime of armed robbery, also a crime of violence.

Most *Sunni* jurists, for example, Imams Abu Haneefa and Malik, are of the view that rape should be punished as adultery or

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fornication, depending on the circumstances of each case, namely, lapidation or one hundred lashes plus imprisonment for a year, respectively. If the required evidence is not presented, then only *Ta'zeer* punishment can be imposed by the *Qadhi*. Doi (1984:252) is of the view that the offender should be punished as if he had committed armed robbery, if the act of rape is committed during the robbery.

Other offences which are punishable by *Ta'zeer* are, attempted theft; eating prohibited food, like carrion, blood and pork; exploitation of an orphan's estate; fraud; perjury; spying for the enemy; and violation of privacy. The above acts have all been prohibited in the *Quran* and *Sunnah*, but no punishment has been prescribed for its commission. (Safwat, 1982:174 & 175).

Imams Malik and Hanbal state that spies can be executed as a form of *Ta'zeer* punishment. According to Safwat (1982:177) the Hanbali School has the most extreme view regarding the imposition of *Ta'zeer* by holding that an offender may be executed if his criminal behaviour cannot be stopped by any other form of punishment.

### 8.12 ATTEMPT

Attempt can be defined as an intentional criminal act which does not achieve its objective. In terms of the Islamic Penal System, an attempt to commit a criminal act is not punishable with either *Hadd* or *Qisas* but with *Ta'zeer* punishment. No specific rules have been provided by the *Shari'ah* for punishment for attempt. (Khan, 1978:263 & 264). Thus it appears that the person attempting to commit an offence is punishable with lesser punishment than if he had completed the act.

The Prophet is reported to have ruled the following regarding the punishment for attempt to commit a *Hadd* offence: "One who approaches the limit without entering it, is among the

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transgressors." (Khan, 1978:264). This means that an offender who is only guilty of attempt is a transgressor and should not be punished to the extent that the actual perpetrator is. Therefore attempted theft is not punishable with amputation but a lesser penalty within the *Ta'zeer* category. Attempt to do the impossible is also punishable provided the accused had the required intent (Shaheed Vol. 2, 1987:51).

### 8.13 COMMON PURPOSE

In the *Shari'ah* this doctrine is referred to as Common Intention, in terms whereof a criminal action which is committed with a common intention by more than one person, has the effect of rendering all liable for punishment. This is usually applicable where there is a pre-arranged plan. It is sufficient if they merely align themselves with the criminal action, even if they do not perform any physical act to further it. (Khan, 1978:261).

Other essential requirements for an offender to be punishable as a consequence of this doctrine are:

- the intention of each of the offenders must be known to all the others and also shared by them;
- there must be more than one perpetrator; and
- the intention must relate to a criminal act. (Khan, 1978:261).

According to Kamalie (1991:270) Caliph Omar applied the doctrine of common purpose to a group of persons who took part in an act of murdering an individual, although only one of them did the actual killing - *Qisas* was applied to all of them.

### 8.14 CONSPIRACY

The *Shari'ah* views conspiracy as the first step towards the

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commission of an offence, since it is the conscious formulation of an intention and preparation to commit a crime. If an offender plans to commit an offence, and this offence is subsequently committed by him, he is punished as a perpetrator. (Khan, 1978:261 & 262). Conspiracy to commit an offence would be punishable by *Ta'zeer*.

### 8.15 RETROSPECTIVITY

The general rule is that an offender can only be punished in terms of existing penal provisions. The *Shari'ah* does not generally make provision for punishment with a retrospective effect. Therefore if an offender commits an offence on a specific day, and thereafter the prescribed punishment for that act is increased, only the lesser punishment can be imposed. However, if the new law provides expressly that the punishment is to have retrospective effect, then the increased penalty will apply. (Khan, 1978:266). Although there is no practical manifestation of retrospective penalties in the *Shari'ah*.

An example of a retrospective provision in the *Quran* (*Surah 22: Verse 4*) is: "And marry not those women whom your father's married, except what hath already happened (of that nature) in the past." Although this Verse allows for retrospectivity, no penal sanction is attached to it, only delictual liability arises. The Prophet never imposed retrospective punishment when acting as a *Qadhi*. (Khadduri & Liebesny, 1984:224).

The following *Quranic* (*Surah 17:Verse 15*) Verse infers that retrospective punishment is forbidden: "And nor shall we be punishing until we had sent them an Apostle."

### 8.16 COMPLICITY

Accomplices to *Hadd* and *Qisas* offences are generally not punished

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to the full extent, but instead a lesser quantum is imposed, usually of the *Ta'zeer* category. However, if the offender is a habitual criminal, the punishment could be more severe than that imposed on the actual perpetrator (Shaheed Vol. 2, 1987:75).

### 8.17 SUMMARY

*Ta'zeer* punishment is imposed in instances where *Hadd* or *Qisas* cannot be imposed or where the strict evidentiary requirements of *Hadd* offences have not been met. There are many instances in the *Quran* where offences are identified but where no punishment is prescribed. The *Qadhi* has complete discretion in determining a suitable penalty in these cases, although he has to impose it in the spirit of the *Shari'ah*.

As such, *Ta'zeer* has a much wider application and can cater for newly created offences. The types of punishment resorting under this category are the following: imprisonment, reprimand, disapproving look, pecuniary penalty, lashes and the death penalty. Although last-mentioned penalty is only imposed for serious offences like spying and rape.

Certain jurists are of the view that the punishment for rape should be the same as that for armed robbery, more specifically the death penalty and crucifixion thereafter. Others are of the view that the punishment for *Zina* should be imposed. Attempt to commit an offence is punishable with a lesser quantum than that which is imposed for the commission of the completed act, whilst conspiracy to commit an offence is also punishable. Generally, retrospective punishment cannot be imposed, unless specifically provided in the *Quran* or *Sunnah*.

In the following chapter the extent to which *Hadd*, *Qisas* and *Ta'zeer* punishment are applied in Muslim countries, will be examined.

## CHAPTER 9 : PENAL SYSTEMS OPERATING IN MUSLIM COUNTRIES

### 9.1 INTRODUCTION

It is not possible to implement the Islamic Penal System in a country where the *Shari'ah* does not form the basis of the legal structure, either as the constitution or the common law. The *Beit ul-Mal*, the economic system and the emphasis placed on marriage and family relations are all essential aspects for the implementation of this penal system.

The Islamic Penal System in its pure form is only practised in Saudi Arabia and Iran. The Schools of jurisprudence that are followed are the Hanbali and *Shi'ite* doctrines respectively. The *Shari'ah* is implemented in a diluted form in Pakistan, Nigeria, Sudan, Afghanistan, Egypt, Libya, and the Arab States in and around the Persian Gulf. *Shari'ah* courts are found in numerous other Muslim states in Africa and Asia, for example, Tunisia, Morocco, Malaysia and Iraq.

In South Africa presently, Muslim groups are negotiating with the Government on the legalising of Islamic law relating to marriage and inheritance. Islamic private law is much more widely practised in the Muslim world (for example: the law of marriage, divorce, inheritance, contract, etc.) than the penal laws. The reasons for this situation is firstly, that the Islamic Penal System can only operate within a true Islamic State, and secondly, that many Muslim states view the penalties prescribed by the *Shari'ah* as too harsh, especially lapidation and amputation.

Hereunder is a discussion of the implementation of the Islamic Penal System in Saudi Arabia, Iran and the other Muslim countries where it is applied to a lesser degree.

## 9.2 SAUDI ARABIA

A Council of Ulema are entrusted with interpreting Islamic Law and are allowed to practise juristic reasoning (*Ijtihad*). There is no comprehensive Penal Code since the interpretation of the Hanbali School of Jurisprudence is applied in the courts. Should a specific problem not be covered by the Hanbali doctrine, a solution is sought in the doctrines of the other *Sunni* Schools, failing which their own reasoning (*Ijtihad*) is followed (Amin, 1985:312). According to Moore (1987:62) no other body of laws apply in Saudi Arabia except the *Shari'ah*.

The *Shari'ah* therefore acts as the country's constitution in terms of which decrees can be promulgated by the Monarch. Penal and criminal laws are not codified and are contained in the Hanbali Doctrine. The death penalty is prescribed for the following *Hadd* offences: apostasy (only Muslim offenders), adultery, fornication, armed robbery and treason. As a form of *Ta'zeer* punishment, the death penalty can also be imposed for political sabotage causing loss of life, conspiracy against the state and rape. (Amnesty International, 1989:198). Persons sentenced to lashes are beaten with a leather whip (Moore, 1987:63). As stated in par. 4.2.5, the *Shari'ah* prescribes an instrument more akin to a light cane.

In order to supplement the *Shari'ah* with punishment for offences for which no provision was made in terms of the Hanbali Doctrine, Royal Decrees are promulgated for offences like drug peddling and pornography. The death penalty is prescribed for certain drug-related offences, like dealing in heroin and international drug smuggling. The method of execution is beheading with a sharp sword in a public place. The death penalty for the *Hadd* offence of armed robbery is only imposed if it was accompanied by loss of life, according to the Hanbali School of Jurisprudence. (Amnesty International, 1989:198).

During the period March 1987 - April 1988 ten people were



executed for drug related offences, whilst for the period 1985 - 1988 a total of one hundred and forty persons were executed by beheading, for capital offences. It can be mentioned that the overwhelming majority of executions were for murder. (Amnesty International, 1989:198 & 199). Since tremendous publicity is generated by these beheadings, they usually occur at a time when most persons are at the Mosque for the midday prayers.

Serious offences are tried in the General Courts of First Instance, which are presided over by a single judge (*Qadhi*). An inquisitorial system of trial methodology is practised in these courts. In cases where the death penalty is a competent verdict on the charge before the court, three judges will preside. If the death penalty is imposed there exists an automatic appeal to the Appeal Court where it is heard by five judges; thereafter the King has the final say.

Persons who committed a capital offence at a time when they were under the age of eighteen years and those who were insane, may not be executed. Pregnant women sentenced to death may only be executed two years after the birth of the baby. The two-year period is for the purpose of breast-feeding and weaning the baby. The Judicial Council reviews all sentences of lapidation, amputation and death (Karl, 1991:146).

A confession by an accused can lead to a conviction for which the death penalty can also be imposed, even in the absence of any other evidence. Extenuating factors are not considered with regard to *Hadd* offences. In the event of the heirs of a murder victim waiving the imposition of the death penalty on the offender, the latter will have to spend at least five years in prison (*Ta'zeer* punishment imposed by the *Qadhi*). Stoning to death is the prescribed penalty for adultery if the accused was married and is carried out in the public square of a town or city. (Amnesty International, 1989:199). The period of imprisonment for murder when *Diyya* is paid is longer than that prescribed by the other schools of jurisprudence.

All executions are by public beheading, except that in certain military-related crimes, offenders may be executed by a firing squad. Examples of last-mentioned offence are spying and armed insurrection. (Amnesty 1990 Report, 1990:204 & 205). There is a system of releasing offenders on bail, but only for minor offences (Dudley, 1982:76).

The penal code of the Hanbali School is the most conservative of the main *Sunni* Schools of Jurisprudence. In terms of this doctrine the King, as the administrator of justice, is the final court of appeal against punishment imposed; he also has to sanction all executions (Shamma, 1965:1034). However, the King is also subject to the laws of the *Shari'ah*. *Shari'ah* courts are to be found in all towns and villages on a decentralised basis (Shamma, 1965:1035). Since no precedent system applies, the *Qadhi* has a wider discretion in imposing punishment (Seaman, 1980:441).

Administration of the penal system is highly decentralised since there is no central co-ordinating or controlling point. Each *Qadhi* is appointed for a specific region and administers the complete system, including the prisons and the actual implementation of punishment. (Amin, 1985:315). This decentralisation is probably the main reason for the lack of national statistics regarding crimes and punishment.

There is a rigid enforcement of separation of the sexes at all levels (school, university, hospitals, public transport, etc.), except that there is no such restriction between spouses.

The Penal System prescribes the death penalty for homosexual acts, even if they occur between consenting adults and stoning to death for acts of prostitution. Homosexual acts which fall short of penetration are punishable with a hundred lashes in public. Lesbian acts are also punishable with a hundred lashes. (Amin, 1985:65). Special provision is however, made for juvenile offenders, where those found guilty of serious offences are

usually sent to a reformatory instead of a prison (Amin, 1985:136). There is thus a complete separation of juvenile and adult offenders within the penal system.

Although the Hanbali School prescribes lapidation for married adulterers, beheading has on occasions been imposed in its place - in 1978 a female member of the Royal family was beheaded after being convicted of adultery (Amin, 1983:81).

Amputation is only imposed for theft if the accused had similar previous convictions. It is also not imposed for theft committed against family members. Amputation is rarely imposed since in most cases of theft, fines or imprisonment are imposed instead (those cases where all the Hadd requirements are not met). (Moore, 1987:65). These rigid requirements are responsible for Ta'zeer penalties being imposed for most cases of theft.

Informal arbitration is often resorted to in cases of minor offences, thus considerably relieving the burden on the judicial system. However, no Hadd or Qisas offences may be adjudicated in this manner. (Souryal, 1987:441). Offenders who have been sentenced to amputation have their hands or feet surgically removed in a hospital (Rice, 1989:92).

In 1979, with a population of nine million inhabitants (plus approximately seven million resident foreigners), there were 46 murders, 671 property crimes and 346 sexual offences. The average world-rate amounted to four times more murders, five times more sexual offences and nine hundred times more property offences. (Souryal, 1987:434 & 435). The disproportionately low rate of property offences is probably as a result of the severe penalties prescribed for theft and armed robbery.

A comparison of the crime rate in Saudi Arabia and those neighbouring Muslim countries which do not fully apply the Islamic Penal System appears hereunder. These statistics apply for the period: 1970 - 1979 and indicates the crime rate per 100

## CHAPTER 9 : PENAL SYSTEMS OPERATING IN MUSLIM COUNTRIES

000 inhabitants.

COUNTRY	MURDER	PROPERTY CRIMES	SEXUAL OFFENCES
SAUDI ARABIA	0,4	7,4	3,2
SYRIA	3,6	59,9	5,0
SUDAN	4,4	255,6	6,9
EGYPT	2,9	75,1	4,9
IRAQ	7,9	25,1	13,0
LEBANON	12,5	150,0	21,6
KUWAIT	3,0	111,9	28,0

The reason for Lebanon's high crime rate can partly be ascribed to the civil war that has been raging there for the past eighteen years. Differences in the crime rate between Saudi Arabia and Kuwait is especially significant since they formed one country previously and the only real difference between them is that the former applies the Islamic Penal System fully and the latter does not. It is also noteworthy that a large number of the offences are committed by foreigners who work or live in Saudi Arabia. For example, about 60% of all murders in Saudi Arabia for the above period were committed by foreigners. (Souryal, 1987:443).

Research conducted by Thakeb & Scott (1981:65) in Kuwait indicates that most Kuwaitis favour the implementation of the Islamic Penal System to its fullest extent in their country.

Souryal (1987:445 & 446) suggests the following reasons for the low crime rate in Saudi Arabia:

- \* Supernatural-Social frame of the Penal System produces a natural conditional force.
- \* Deterrent effect of punishment in the Hereafter and rewards for good deeds.
- \* A *Haram* act is both morally and religiously wrong.

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- \* A *Haram* act is both morally and religiously wrong.

- \* Mandatory five-times a day prayers entailing a direct supernatural experience of great religious and personal significance.
- \* Strong familial bonds and the high regard for family honour.

Souryal (1987:448) is further of the view that the low volume of criminality in Saudi Arabia will continue as long as the *Shari'ah* and its penal system remains the major force behind the religiosity of that society.

### 9.3 IRAN

The Government of Iran forms part of the *Shi'ite* sect in Islam and mainly follows the interpretation of the Jaffaria School of Jurisprudence in matters of Penal Law. Both *Hadd* and *Qisas* penalties are imposed in appropriate cases. However, a variety of methods of execution are employed, for example, hanging, stoning and shooting by firing squad. According to Amnesty International (1989:149) the death penalty can also be imposed for drug trafficking, drug abuse, political offences, prostitution and corruption.

Iran's Penal Code was promulgated in 1982, shortly after the Islamic revolution, whilst the balance of the criminal law was codified into a Criminal Code and a Criminal Procedure Code. These laws have all been codified from the contents of the *Shi'ite* interpretation of the *Shari'ah*. It prescribes the death penalty for the following offences: premeditated murder, rape, adultery, sodomy and repeated counts of drinking liquor. However, in terms of the law of *Qisas* the accused can only be executed once the heir(s) consents thereto, since they can also waive this penalty in favour of *Diyya*. Persons under eighteen years, blind persons and those who are insane may not be executed. (Amnesty International, 1989:149 & 150).

Criminal Courts adjudicate on the usual criminal offences, whilst Islamic Revolutionary Courts with religious judges hear the political cases. All death sentences are referred to the High Judicial Court, consisting of Islamic jurists. Restrictive evidentiary requirements apply in all criminal cases involving *Hadd* offences.

The death penalty is frequently imposed on drug dealers who usually constitute about twenty five percent of all executions for a particular period. During 1987, 158 people were executed, a large portion of which were for drug related offences. (Amnesty International, 1989:150 & 151). During the period March 1983 - March 1984, 1 700 people had their hands amputated after being convicted of theft (Amin, 1989:54).

In terms of the Iranian Penal Code, five types of punishment can be imposed for adultery:

- stoning to death for married perpetrators;
- one hundred lashes for unmarried perpetrators;
- one hundred lashes and stoning for elderly married persons;
- beating, shaving of the head and banishment for one year for married persons who had not consummated their marriage; and
- execution when the offence involved special circumstances.

#### **9.4 NIGERIA**

Nigeria, which is situated in West Africa, is Africa's most populous, militarily one of the most powerful and an economically well endowed country. It is not an Islamic State *per se*, although the 70 million Muslims constitute the majority in Nigeria, which has a population of about 100 million inhabitants. The Muslim population is concentrated mainly in the Northern parts of the country and the Maliki School's interpretation is applied in criminal matters of. There are special *Shari'ah* Courts in which this law is applied. (Anderson, 1970:172).

Over the years the Islamic Penal System has applied to varying degrees, but was never fully applied.

However, the criminal law is not codified and is contained in a constitution and various statutes based on English Law. There is furthermore, no uniform application of the *Shari'ah*, as it is not an Islamic State.

There is a strong influence of English Law in the Nigerian penal system since it was a British colony before independence and because many of its judges were trained in England. However, this influence is on the wane in the Northern states (Nigeria has a federal form of government in which states enjoy a measure of autonomy), where the *Shari'ah* has precedence. Another factor which has influenced the implementation of the Islamic Penal System has been the military regimes that have ruled this country since independence. (McNally, 1990:473).

Before lashes are inflicted on an offender, the Emir or Muslim leader has to sanction it. Prior to this, the accused may appeal to the Court of Appeal. There are many laws relating to the implementation of the private law of the *Shari'ah*, like marriage, inheritance, contracts, etc., which apply fully in Northern Nigeria (Anderson, 1970:176). The Federal Government is apprehensive about the implementation of the harsh penalties contained in the Islamic Penal System.

Since 1966, *Hadd* punishment for the offences of armed robbery, adultery, defamation and drinking wine have been imposed, whilst the law of *Qisas* applied to murder and assault. Apostasy has on rare occasions been added to the list of *Hadd* penalties. The restrictive evidentiary requirements relating to adultery and other *Hadd* offences are strictly adhered to. A form of suretyship, similar to the concept of bail, is available to certain accused. (Anderson, 1970:194 & 195).

All other offences not contained in the above two categories have



to be criminalised by the Emir. These are then treated as Ta'zeer offences for which discretionary punishment can be imposed by the Qadhi. Most of these laws are imposed to protect the moral and material well-being of the State. However, because of the limited scope of Hadd offences and the strict requirements for convictions, most criminal cases are tried in the ordinary criminal courts, except in Northern Nigeria where the Shari'ah courts are often utilised. (Anderson, 1970:195).

A man found guilty of fornication is punished with one hundred lashes and one year imprisonment, whilst the woman is sentenced to a period of imprisonment with the option of a fine. Those found guilty of adultery are imprisoned for long periods since lapidation is not allowed by the Federal Government. Lashes may not be inflicted on women for any offence whatsoever. If a man falsely accuses his wife of adultery a discretionary punishment will be imposed - usually a fine. There is no record of anyone being stoned to death for adultery during the period prior to the Government outlawing lapidation (Anderson, 1970:196).

The Islamic Penal System is not applied uniformly throughout the country, in certain areas there is stricter and more orthodox application than in others. For example, in the city of Bid'a, it is a crime which is punishable with up to two years imprisonment and a fine, if a man seduces a virgin resulting in her pregnancy, whilst adultery is only punishable with a fine. In Birnim adulterers are sentenced to one hundred lashes and three months imprisonment. (Anderson, 1970:196). The Penal Law contains a mixture of the provisions contained in the Shari'ah, English Law and local customary law.

Amputation as a penalty for theft is not permitted by the Government and instead Ta'zeer punishment is imposed. Imprisonment is usually imposed for crimes of theft being in possession of stolen goods. The strict evidentiary requirements do not apply to this offence. (Anderson, 1970:197). The Federal Government has forbidden the imposition of dismemberment as a

form of punishment.

According to the Maliki School, it is not a requirement for a conviction, that perpetrators of the crime of drinking liquor be caught in the act, it is sufficient if they merely smell of liquor. Although the official *Shari'ah* penalty is forty or eighty lashes, fines or imprisonment are usually imposed in practice. In cities like Bid'a and Ilorin, this act is not considered to be an offence. The *Hadd* offence of false accusation of *Zina* (*Qadhif*) is usually punished with a fine or some other lesser penalty. (Anderson, 1970:197). In towns with a minority Muslim population, Islamic Penal Law usually does not apply.

The law of *Qisas* applicable to assault is not applied in Nigeria, whilst in practice lashes are not as severe as those imposed in Saudi Arabia and Iran. Assaults are mainly dealt with as civil actions. (Anderson, 1970:197). Thus the Law of *Qisas* is reserved for murder and culpable homicide.

Although the Private Law contained in the *Shari'ah* is applied widely and diligently in Northern Nigeria, the Criminal and Penal Law's application and implementation is rapidly declining. The reason being mainly because of its evidentiary restrictions and the severity of the punishment, which clashes with many of the customs prevalent in the country.

Methods of execution employed are hanging and shooting by firing squad; it takes place in public so that its deterrent effect is increased. There were a total of 45 executions during 1987 for offences ranging from murder to armed robbery. The fact that the country has a federal structure allowing each state a measure of autonomy explains the diversity of penalties applied. Nigeria has also been under military rule for a number of years, thus further eroding the implementation of Islamic Penal Law. (Amnesty International, 1989:185 & 186).

Under the present leadership of Maj.-Gen. Ebrahim Babangida, who has a stronger leaning toward the West than his predecessors, the implementation of Islamic Penal Law has been curtailed even further and the list of capital offences has also been reduced considerably (Amnesty International, 1989:186). The *Shari'ah* Court of appeal came into existence in 1960 and operates in ten states in Northern Nigeria (Okonkwa, 1980:128 & 129). The influence of Islamic Fundamentalism has not had much impact in Nigeria.

#### 9.5 PAKISTAN

Although the majority of the population in Pakistan is Muslim (110 million), it is not a true Islamic State. *Hadd*, *Qisas* and *Ta'zeer* categories are not strictly followed by the judicial authorities. The list of capital offences include: murder, kidnapping a child, abetting mutiny and insulting the name or reputation of the Prophet Mohammed. The Federal *Shari'ah* Courts apply the Penal Law of the *Shari'ah*, whilst ordinary Criminal Courts have concurrent criminal jurisdiction. (Amnesty International, 1989:187 & 188).

Pakistan was established as a Muslim State in 1947, but it was only during 1977 that it took the first steps towards Islamizing its judicial system (Collins, 1988:567). The law is not codified but is contained in ordinances based on the *Shari'ah* and English Law.

There has been an initiative in 1988 to broaden the application of the *Shari'ah*, but resistance was forthcoming from the largest politico-religious groups because of President Zia's piece-meal introduction thereof. They were of the view that the *Shari'ah* must be applied in its totality. Islamic Penal Law thus does not yet have full application since Islamization is still in process. (Haqqani, 1988:30 & 31).

According to the Execution of Punishment of Whipping Ordinance, a woman may sit whilst being beaten and a man may stand. It should not be implemented if the climatic conditions are either too hot or too cold or if the recipient is not in good health. Weiss (1986:13) states that the lashes should not be inflicted in a manner that could result in maiming or killing the offender.

If all the requirements of the *Shari'ah* are complied with, a thief's right hand is amputated for a first offence. On a second conviction the offender's left foot is amputated at the ankle, whilst for a third offence or more, life imprisonment is imposed. (Weiss, 1986:14).

Armed robbery is punished in the following manner:

- \* Threats of violence with no theft: Maximum of thirty lashes and three years imprisonment.
- \* Theft but no homicide: Punishment for theft applies.
- \* Homicide but no theft: The punishment is execution.  
(Weiss, 1986:14).

Stock theft is severely punished, the a maximum being seventy lashes or fourteen years imprisonment (animal husbandry is a major source of income and employment in Pakistan). Bars and nightclubs are outlawed and the punishment for possession of liquor is two years imprisonment or thirty lashes and a fine. The punishment for selling, manufacturing or importing liquor is five years imprisonment plus thirty lashes and a fine. (Weiss, 1986:15).

The offence of rape is dealt with in the same way as the *Hadd* offence of *Zina*, which category also includes prostitution (Mehdi, 1990:22 & 23). Consequently, if either the rapist or his victim was married at the time of the act, the punishment is

death by stoning, whilst if both were unmarried, the offender would be sentenced to one hundred lashes plus any additional punishment at the discretion of the *Qadhi* (such additional penalty includes the death penalty).

If the restrictive requirements for *Hadd* offences are not met during a conviction for rape, the penalty is thirty lashes plus twenty five years imprisonment for both married and unmarried offenders. This punishment is of the *Ta'zeer* category. For the period 1979 - 1990 no *Hadd* punishment had been imposed for rape, only *Ta'zeer* (this was mainly due to the restrictive evidentiary requirements not being satisfied). (Mehdi, 1990:23). In 1980 the Federal *Shari'ah* Court was introduced to examine cases according to Islamic Law (Nadvi, 1989:174). This court has the power to invalidate any law which contains provisions contrary to the *Shari'ah*.

In the constitutional sphere the *Shari'ah* benches on the Supreme Court ensure that the laws passed by Parliament are not incompatible with the *Shari'ah*. The Federal *Shari'ah* Court has the highest criminal jurisdiction and also the authority to impose *Hadd* and *Qisas* punishment, like stoning for adultery, execution for murder and the death sentence for armed robbery where a fatality ensued. Although during the early nineteen-eighties there was a constitutional battle against stoning as a penalty for adultery, it is now finally decided that it is the prescribed penalty in terms of the *Shari'ah*. However, no one has suffered this punishment to date. (Amnesty International, 1989:188).

There is an automatic appeal to the Supreme Court against the imposition of the death penalty, where up to seven judges hear the matter. The President and the Provincial Governors are empowered to reprieve offenders and grant clemency. The strict evidentiary requirements for *Hadd* and *Qisas* offences are observed by the *Shari'ah* Courts.

During the early period of 1989, the President suspended all executions and commuted the majority of the sentences at the request of the newly elected Prime Minister, Benazir Bhutto. (Amnesty International, 1989:188 & 189). This prime minister has since been deposed.

Since the penalties of lashes, amputation and lapidation were introduced in 1981, 32 people have been sentenced to be lashed publicly, 22 convicted thieves had their hands amputated and one person was stoned for adultery (Lippman, 1988:108). During 1992 the Pakistani High Court ruled in favour of the supremacy of Islamic Law over the existing Constitution, a decision which will promote the Islamizing of Pakistan's penal system further (Ali, 1992:18).

#### **9.6 SOMALIA**

Somalia is situated in East Africa and has a majority Muslim population. *Shari'ah* Courts apply Islamic Law to various degrees, although Islamic Penal Law is not applied to its full extent. The doctrine of the Shafi'i School is followed throughout the country. Somalia's penal provisions which are contained in its Penal Code is a mixture of customary and Islamic Law, for example, juvenile offenders may only be sentenced to a maximum of twelve lashes. (Anderson, 1970:48 & 49). The whole body of criminal law is codified with the *Shari'ah*, Italian Law and customary law as its bases.

Procedural and evidentiary aspects are rigidly applied in the *Shari'ah* Courts (Anderson, 1970:50). The Penal Code which was enacted in 1962 provides for the imposition of the death penalty for a number of offences (mainly of a military and security nature), including murder (Amnesty International, 1989:203). This list of capital offences was obviously influenced by the fact that Somalia was under military rule for a number of years and has been at war with Ethiopia and numerous internal factions

since its independence in 1960.

The Penal Code views rehabilitation of the offender as the major objective of punishment (Noor Mohammad, 1972:318). This Code is based on the Italian model and provides for minimum and maximum penalties (Noor Mohammad, 1972:320). Minor offenders are referred to a reformatory, whilst lunatics are referred to an asylum. Prisoners who are serving long terms are released after five years if they are rehabilitated (ten years in the case of a recidivist). (Noor Mohammad, 1972:325).

In line with the *Shari'ah*, pregnant women may not be executed until a year after the birth of their baby, whilst insane persons may also not be executed. All executions are by firing squad.

However, all this changed when a military dictatorship assumed power in 1969. Islamic Law was purged and strenuously resisted by the military, and today there is no implementation of Islamic Penal Law to any significant degree.

The military strenuously resisted the incorporation of any Islamic Law, especially Islamic Penal Law into the present legal system which is dominated by military tribunals. In fact, during 1987 when Muslim religious leaders attempted to introduce "moderate" Islamic Laws they were arrested and sentenced to death - their sentences were later commuted to long terms of imprisonment. (Amnesty International, 1989:203 - 207)

#### 9.7 SUDAN

Sudan is a very large but sparsely populated country in Africa, which considers itself to be part of the Arab world. Islamic Penal Law has been applied in the Sudan since 1504 during the Funj Kingdom. The death penalty was imposed for adultery, whilst imprisonment was prescribed for fornication. Murder was also punished with execution, whilst the convicted thief's right hand

was amputated. Eighty lashes were imposed for drinking wine. (Al-Azmeh, 1988:235).

Penal and Criminal Codes were promulgated in 1983 and are largely based on the *Shari'ah*, which forms the common law system of the Sudan. However, the death penalty has been extended to a number of other offences like subversion, initiating a war, subversion of the economy and numerous other political offences. (Amnesty International, 1989:208). The law of *Qisas* is applied to acts of murder - the heirs of the victim can therefore waive the death penalty in favour of *Diyya*.

The manner of execution was hanging, whilst the forms of punishment meted out for *Ta'zeer* penalties included imprisonment, fines and whipping (Al-Azmeh, 1988:236). However, according to Al-Azmeh (1988:238), for the period that Sudan was under British rule, a Penal Code based on European law was promulgated in 1889, thus effectively side-lining Islamic Penal Law .

With independence and the commencement of the rule of President Nimeiry began the Islamization of Sudan's law. This process included the promulgation of a Penal Code based on the *Shari'ah*. (Al-Azmeh, 1988:241). *Hadd* punishment is rigidly applied, whilst non-Muslims are punished in terms of their own religious laws (Al-Azmeh, 1988:243).

*Hadd* penalties are imposed for adultery, fornication, sodomy, apostasy, defamation and armed robbery. Severe *Ta'zeer* penalties are also imposed for keeping a brothel and organised crime. The death penalty is only imposed on persons between the ages of eighteen and seventy years. Nursing mothers and the insane are also not executed. Persons tried on capital charges have a right to legal representation and may appeal if convicted. (Amnesty International, 1989:208). Thus the Islamic Penal System has greater application in the Sudan than in any other African country.



Between 1983 and 1985 over one hundred sentences of amputation for theft were imposed (Amnesty International Newsletter, Dec. 1990).

The Head of State has the right to grant clemency or reprieve an offender sentenced to death. Imprisonment is a harsh experience since prisoners are constantly chained by the hands and feet. The means of execution is hanging, except where the offence is adultery, although lapidation has not as yet taken place. Crucifixion is also prescribed for certain cases of armed robbery and executions are held in public to increase its deterrent effect.

An innovation to Islamic Penal Law was introduced into the legal system, namely, by punishing offenders for the offence of attempted adultery. Such persons are sentenced to receive lashes in public. (Al-Azmeh, 1988:243 & 244). Muslims found guilty of drinking wine could be sentenced to forty lashes and imprisonment, whilst non-Muslims are liable to be sentenced to a whipping and a fine or imprisonment on default of such payment (Al-Azmeh, 1988:244). *Qisas* Punishment is applied in cases of homicide and assault.

The offence of *Zina* has been extended to include rape and sodomy, for which the death penalty applies (Amin, 1985:341). Married persons found guilty of adultery are executed, while non-Muslims are punished according to their religious laws. The penalties for armed robbery are death by hanging, amputation of the opposite limbs and imprisonment, depending on the nature of the offence. (Amin, 1985:342).

A poor system of communication and a large nomadic population has led to a decentralised penal system which in turn accounts for the lack of national crime statistics (Khalil, 1971:638). According to Amnesty International (1989:209), after the overthrow of President Nimeiry in 1985, the application of Islamic Penal Law has been relaxed.

Lippman (1988:106) states that most recent statistics indicate that over a 15 month period ending in 1987, 54 convicted thieves had their hands amputated, 6 recidivist thieves had two limbs amputated and 3 persons convicted of armed robbery were sentenced to death by hanging.

There is strong opposition from non-Muslim residents living in South Sudan, against the implementation of the Islamic Penal System. This has in turn resulted in a devastating five year civil war (Sherman, 1989:277). The Penal Code which was promulgated in 1983 entailed a strict interpretation of the *Shari'ah*. The *Hadd* offence of *Zina* includes rape and sodomy. (Sherman, 1989:294). Thus the penalty for these offences were either lapidation or one hundred lashes, depending whether the perpetrator was married or not.

After President Nimeiry was deposed, the Government instructed the Attorney-General, Hassan al-Turabi, to compile a new Penal Code. He immediately suspended the implementation of *Hadd* penalties, although on a temporary basis. The new Penal Code which was promulgated in 1988 merely entailed a rewriting of the 1983 Code, provided that it was more rigid in following of the principles contained in the *Shari'ah*. The major difference was that the Code of 1988 was no longer applicable to non-Muslims. (Sherman, 1989:298).

## 9.8 EGYPT

Egypt's population is overwhelmingly Muslim, but it is also not a true Islamic State. Egypt's Penal Code is not based on the *Shari'ah* and includes capital offences like arson which caused the death of a person and hijacking. In practice the death penalty has been imposed for rape and drug trafficking. The last-mentioned offence has been the one for which over half of all the country's executions have been imposed. (Amnesty International, 1989:130). Most executions result from

convictions of drug offences, relating to heroin and opium.

As early as 1875 the Government adopted the French Penal Code, thus relegating the *Shari'ah* to the background. In fact, no mention of the *Shari'ah* is made in the Code. (Baer, 1977:141). Prior to this date when the *Shari'ah* applied, it was not rigidly adhered to, especially the penal system contained therein (Baer, 1977:158).

Insane persons, those under the influence of drugs and mentally deficient persons are exempt from capital punishment. A pregnant woman is only executed two years after the birth of her baby, whilst those under the age of eighteen years are also exempt from execution. The Muslim religious leader called the *Mufti*, must approve all death sentences before they can be implemented. According to Amnesty International (1989:131) such acts of execution take place by means of hanging.

The major forms of punishment are the death penalty, imprisonment (with or without hard labour) and fines. In 1975, ten persons were executed, whilst 4 668 were imprisoned with hard labour and 975 imprisoned without hard labour, countrywide. (Hill, 1979:Figure 20). According to Article 237 of the Penal Code, a man convicted of a crime of passion, for example, killing his wife after finding her in a compromising position with her lover, can at most be sentenced to six months imprisonment (Dwyer, 1990:19).

A man convicted of rape of a woman over whom he is in a position of authority for example, an employer relative to his employee, can be sentenced to life imprisonment with hard labour (Dwyer, 1990:20). In cases where more than one perpetrator is involved in an act of rape, all are liable to be sentenced to death.

Since 1980 the tide has turned toward Islamic Fundamentalism and in May of that year Egyptians voted overwhelmingly in favour of re-introducing the *Shari'ah* as a major source of law. This

movement received impetus with the election of numerous Fundamentalists to Parliament in the election of 1987. (Dwyer, 1990:15). No doubt these events will have a decisive influence over changes to Egypt's Penal Code in the future.

In the late nineteen-eighties the Speaker of Parliament (*Majlis*) chaired a committee whose brief it was to draft new Islamic legislation. Subsequently the *Majlis* passed six new Codes, including a Penal Code which is more in line with the *Shari'ah* than the previous one. (Heer, 1990:172). However, the constitution is still based on the French model.

### 9.9 LIBYA

Libya, an oil-rich country adjacent to the Sudan has a Penal Code which has also been influenced by a "military" element since the take-over of the government by Col. Mu'ammarr Gaddafi in 1969. This Code established the following crimes as capital offences: dealing in drugs, murder, killing a government official, destruction of an oil installation and robbery during which a death was caused (Amnesty International, 1989:168). That the death penalty may not be imposed on those under the age of eighteen years or insane persons reflects the influence of the *Shari'ah*.

The Maliki School's interpretation takes precedence in matters of interpreting the *Shari'ah*. Since 1969 the Islamic Penal System has been introduced piece-meal into the legal system, which is contained in a constitution and other laws promulgated by the Legislative Assembly. The constitution contains a mixture of the law contained in the *Shari'ah* and those originating in French Law. The first act being the prohibition on the transport and usage of alcohol, for which forty lashes was imposed on conviction. (Dwyer, 1990:102).

Between 1971 and 1974 *Hadd* penalties were introduced for theft,

adultery and usage of alcohol. A medical examination precedes the imposition of lashes and amputation of a limb. The penalty of crucifixion has been removed from the Penal Code. (Dwyer, 1990:104 & 105). Islamic Fundamentalism is also poised to play a leading role in further Islamizing the Penal System in Libya.

Prior to the death penalty being imposed for a capital offence, the advice of the religious leader (*Mufti*) is sought. By 1973 the *Shari'ah* had become the major influence over the legal system and the Government moved swiftly to ban nightclubs and gambling (Rice, 1987:233).

Public executions were held until 1988 when the leadership moved strongly towards abolishing the death penalty. The Government has since curtailed the use of the death penalty but has stopped short of abolishing it. (Amnesty International, 1989:169). It is thus clear that the *Shari'ah*, especially its penal system, presently has limited application in Libya.

#### 9.10 UNITED ARAB EMIRATES

This is one of the numerous Arab countries around the Persian Gulf, but is also not a true Islamic State, although the majority of its population is Muslim. The Penal Code is largely based on the *Shari'ah*, but is modified to the extent that the list of capital offences include rape, certain property offences and drug-related crimes. In terms of its Penal Code the death penalty can be imposed for apostasy, adultery, armed robbery and treason. Those under the age of eighteen years cannot be executed, whilst the execution of a pregnant mother is suspended till after her baby is weaned. All persons sentenced to death can appeal to the High Court of Appeal. (Amnesty International, 1989:225).

The Criminal Code is based on the *Shari'ah* which forms the common law of the country. The Head of State is empowered to pardon

offenders even in the case of *Hadd* penalties, which amounts to a deviation from the strict interpretation of the *Shari'ah*. The death sentence takes the following forms:

- beheading: executions in terms of *Hadd* offences;
- hanging: state security infringements; and
- stoning: those convicted of adultery.

Most of the executions result from the imposition of *Hadd* punishment (Amnesty International, 1989:226).

The Government altered the penalty of lapidation, which was imposed on a resident foreigner, to one hundred lashes and deportation. Two other foreigners who were sentenced to lapidation had their sentences altered to one hundred lashes, imprisonment for a year and eventually deportation. However, the lashes were not implemented because a reprieve (due to the pregnancy of the woman) was granted by the religious leader of the country. (Amnesty International, 1989:226). The death penalty which is also imposed for rape, is carried out by firing squad (Argus, 28/7/92).

#### 9.11 YEMEN (SAN'A)

This is a small Arab State situated at the Southern end of the Arabian Peninsula and has followers of both the *Sunni* and *Shi'ite* sects. Although its Penal Laws are based on the *Shari'ah*, it is not implemented in its pure form. All the *Hadd* offences are included in the Criminal Code (adopted in 1979), whilst the death penalty is also prescribed for sodomy, crimes against the State, kidnapping and certain military offences. The *Shari'ah* constitutes the common law system from which the codes of law are compiled.

*Qisas* is applied to murder and culpable homicide, but only in so far as the victim is Muslim. *Hadd* punishment lapses if the

person convicted of apostasy repents or reverts to Islam. Insane persons and those below the age of fifteen years are presumed to be not criminally responsible. (Amnesty International, 1989:233).

The Head of State is empowered to pardon or delay the implementation of *Hadd* punishment if it is in the public interest. Pregnant women can only be executed two years after they gave birth, whilst a further requirement is that there must be someone to care for the baby. The death penalty can be reviewed by two further levels of appeal and the Head of State has the final say. (Amnesty International, 1989:233). A large portion of this country is rural and supports a clan system.

Executions, whether by stoning or beheading, do not take place in public. Crucifixion in cases of armed robbery is also not carried out in public, but in certain private demarcated areas. Of the twenty five persons executed during 1987, twenty two were for murder (*Qisas*) and three for armed robbery with aggravating circumstances (*Hadd*). In 1986 a professor was sentenced to death for apostasy but the *Hadd* penalty was never implemented because the accused left the country. A man who was convicted of raping and murdering his victim in 1988 was sentenced to one hundred lashes and then beheaded. (Amnesty International, 1989:234).

During 1977 a new judicial organ known as the *Niyaba*, having similar powers to the office of a prosecutor, was established by the Government. It has both investigative and prosecutory powers and its functions are further extended to include protecting minors and being in control of the prisons within its jurisdiction. Prior to the establishment of this office, complainants had to present their own case in the *Shari'ah* Courts. (Messick, 1983:507).

#### **9.12 YEMEN (ADEN)**

The State's constitution is based on the Marxist-Leninist model.

However, in 1963 the Penal and Criminal Law was codified with the Shafi'i interpretation of the *Shari'ah* as a basis (Al-Hubaishi, 1988:112). In the rural areas where tribes still exist, *Diyya* is paid by the tribe on behalf of the offender. Thus there is a strong influence from family and clan members on potential offenders to remain law-abiding. (Amin, 1987:58). A new Penal Code, which is closer to the Islamic Penal System was promulgated in 1979.

### 9.13 SYRIA

There are five different types of penalties that can be imposed in terms of the Syrian Penal Code:

(a) Felonies (*Jinayat*) - for example, murder. Competent penalties are: the death penalty, life imprisonment (with or without hard labour) and imprisonment for a period of between 3 and 25 years.

(b) Political Felonies (*Jinayat Siyasiyya*) - for example, sabotage. Competent penalties are: imprisonment for periods of between 3 and 25 years, which could be coupled with a restriction on the movements of the prisoner once he is released, or a loss of civil rights.

(c) Misdemeanours (*Junah*) - for example, theft. Competent penalties are: imprisonment for periods of up to 3 years (with or without hard labour).

(d) Political Misdemeanours (*Junah Siyasiyya*) - competent penalties include imprisonment of up to 3 years, which could be coupled with restrictions on freedom.

(e) Infringements (*Mukhalafat*) - minor offences. Competent penalties include imprisonment up to 10 days or a fine. (Amin, 1985:160).



Although the majority of the population is Muslim, the *Shari'ah* has little, if any, application here. Since 1964 Syria has had a constitution based on the socialist model.

#### 9.14 JORDAN

To a large degree Jordan's Penal Code is based on the *Shari'ah*. Penalties range from the death penalty for serious offences, to fines and imprisonment for other offences. (Amin, 1985:261). There is also a strong Islamic Fundamentalist movement promoting greater Islamizing of the legal and penal system.

The Constitution, which has elements of the *Shari'ah* (mainly the civil laws) contained therein, expressly prohibits the torturing of prisoners and accused awaiting trial. Two types of imprisonment are maintained: civilian prisons for less serious offences and high security prisons for those contravening security legislation. (Dudley, 1982:75).

#### 9.15 BAHRAIN

*Shari'ah* courts apply Islamic Penal Law within their Penal System. A system of appeals lie to the High Court and the Supreme Appellate Court from the courts of first instance (Amin, 1985:36 & 37). The Islamic Penal System applies to a significant degree in Bahrain, where the population of half a million inhabitants are equally divided between *Sunni* and *Shi'ite* sects. The Emir (religious leader) has to approve all important decisions in the country. The constitution is based on the welfare state model, offering significant benefits to indigent and aged persons.

**9.16 AFGHANISTAN**

The doctrine of the Hanafi School is adhered to in the implementation of the penal laws, unless there are statutes which have precedence. Prior to 1978 the penal system was based on the European model. Since the Islamic Fundamentalist movement replaced the Russian backed Government, it is expected that the Penal System contained in the *Shari'ah* will be applied more rigidly in the future. (Amin, 1985:9). Indications are that this country is moving toward establishing itself as a true Islamic State. The criminal laws are contained in the constitution and various other ordinances are based on the *Shari'ah*.

According to Ghani (1983:357), records indicate that a penal system based on the *Shari'ah* was already operative in 1885, but was later replaced by the European model (Ghani, 1983:357).

**9.17 TURKEY**

During 1924 Kemal Attaturk abolished the Sultanate and replaced the existing Islamic Penal Code with a new Code based on the Swiss model (Rice, 1987:164). In 1958 the Ottoman Government replaced the existing Penal Code with the French Penal Code. However, the system of *Diyya* has been retained for many offences, like murder and culpable homicide. (Baer, 1977:140). The constitution is based on the European model and the *Shari'ah* has limited application in Turkey at present. However, since 1950 there has been a growing demand for a return to Islamic Fundamentalism (Dwyer, 1990:95).

**9.18 MALAYSIA**

Islamic Penal Law is applied to a very limited degree, in fact, only religious crimes are punished in terms of their Penal System

(Wu Min Aun, 1978:37). This is so despite the fact that the overwhelming majority of the population are *Sunni* Muslims. The Government is presently considering expanding the scope of the *Shari'ah* in the judicial system, a process supported by many senior judges. The constitution is modelled on the British system and the laws are not codified. In other spheres of the law, for example, marriage, divorce, inheritance and delict, the *Shari'ah* applies.

Apostasy is a punishable offence only if the accused acts in a hostile manner towards Muslims or the Islamic State or threatens such action (Kamali, 1992:70 & 71).

Recently there has been recommendations to upgrade the *Shari'ah* Courts to a three-tier hierarchical system, since the *Shari'ah* Courts currently only have jurisdiction over family disputes, divorce, child maintenance and inheritance. In order to facilitate this process the Government intends training *Qadhis* at universities so that they can adequately carry out their functions. (Aznam, 1987:25). These *Qadhis* will also be trained in the application of the penal laws contained in the *Shari'ah*.

However, problems are being encountered, like the absence of an adequate socio-economic system and the prevailing attitudes toward crime and punishment. The Government is also grappling with the idea of reconciling the effect of implementation of the *Shari'ah* on non-Muslim inhabitants. There is also an Islamic Fundamentalist group known as PAS (The Islamic Party) which is striving toward the conversion of Malaysia into an Islamic State. (Aznam, 1987:25). The Federal Government recognises the problems it will encounter if the penal laws are not applied against a suitable economic and socio-political background.

During the 1990 elections, PAS captured the state of Kelanta and promptly gave notice that the Islamic Penal System would be introduced in stages, commencing with *Hadd* penalties. The Federal Government has indicated that it would not oppose or

interfere with this implementation. It can be mentioned that during the mid-nineteenth century the Islamic Penal System applied in this state. (Vatikiotis, 1992:28).

#### 9.19 INDONESIA

Although the largest Muslim population in the world (159 million) resides in this country, the *Shari'ah* has no application; instead local and customary laws apply. During 1988 the Islamic laws of marriage, divorce and inheritance were codified and introduced into the Constitution. The Shafi'i interpretation was followed in its compilation. (Vatikiotis, 1988:28). There are no moves to have the Islamic Penal System introduced into the constitution in the near future.

The reason for the non application of the *Shari'ah* in Indonesia was that since the time it was colonised by the Dutch, the colonial authority introduced and applied the Dutch legal system. There was thus never an opportunity for the Islamic Penal System to be applied. (Lippman, 1985:35). The penal and criminal law is not codified and the constitution is based on the socialist model (Nadvi, 1989:288).

#### 9.20 SUMMARY

The Islamic Penal System is applied to varying degrees in Muslim States the world over. Countries where this system is applied to any significant degree are Iran, Saudi Arabia, the Arab states around the Persian Gulf, Pakistan and the Sudan. In Saudi Arabia the interpretation of the Hanbali School is followed, whilst additional criminal offences are created by Royal Decree.

Despite the fact that more than seventy percent of the population in Nigeria are Muslim, the Islamic Penal System is not applied to any significant degree; although Islamic personal law is applied

comprehensively in Northern Nigeria. The present leadership has strong leanings toward the West and is constantly eroding the application of Islamic Penal Law.

There are signs that the governments of Pakistan, Afghanistan and Jordan are willing to increase the ambit of the application of the Islamic Penal System in their respective countries. Although law and order has recently broken down in Somalia, the *Shari'ah* applied there to a significant degree, especially in the criminal courts.

The Islamic Penal System has applied to varying degrees in the Sudan since 1504. As the country is largely rural and the penal system is also applied on a decentralised basis. With independence in the early seventies the application of the Islamic Penal System increased significantly. The penal law has developed to the extent that an offence of attempted adultery has been established.

With the international growth in Islamic Fundamentalism there has been a commensurate increase in the move toward introducing the *Shari'ah* into the constitutional systems of Muslim countries. This is especially evident in the Arab states and Muslim countries in Northern Africa and the Middle East. The Islamic Penal System has also been introduced into Malaysia.

Although many Muslim countries still apply the Islamic Penal System to a significant degree, others are hesitant to introduce it, mainly because of the severity of the penalties contained therein. This is especially so in Muslim countries having a significant non-Muslim population. A further restrictive is that this system can only operate within a true Islamic State. Many Muslim countries have instead adopted penal systems of European countries, for example, Egypt, Libya and Turkey.

## CHAPTER 10 : CONCLUSION

### 10.1 INTRODUCTION

The Islamic Penal System differs markedly in both ambit and application, from those penal systems operating in Western countries. In this chapter the various areas of peculiarities between the penal systems operating in Western countries and the system contained in the Islamic Penal System will be addressed.

### 10.2 ISLAM AS A TOTAL WAY OF LIFE

Islam does not only govern the spiritual aspects of the life of a Muslim, but all the other practical activities of individuals from birth to life in the Hereafter. The *Shari'ah* and the economic system play an integral role in the penal system and also makes provision for crime inhibiting measures.

The *Quran* and *Sunnah* as the primary sources of Islamic Law cannot be changed by any other legislative measure. However, in order to make provision for the various indigenous and customary influences prevalent in Muslim countries, schools of jurisprudence interpret aspects of the *Shari'ah* in order that these extraneous influences are considered and taken into account. This facilitates the application of the *Shari'ah* worldwide.

### 10.3 ISLAMIC PENAL OBJECTIVES

More emphasis is placed on reciprocity than is the case in most Western penal systems. The reason for this position is that in the event of offenders not being punished relative to the harm caused by their act, victims or their friends and family may avenge such actions. This would result in a cycle of violence and other unlawful activity as counter revenge actions are taken.

People tend to take the law into their own hands or lose confidence in the effectiveness of the judicial system if they are not satisfied that offenders are adequately punished. The *Shari'ah* insists that the quantum of punishment imposed on the offender be equivalent of the degree of harm caused. Victims and society in general must be satisfied that justice has been done. If potential offenders are aware that punishment which is equivalent to the harm caused will be imposed on them, it may have a salutary effect of their criminal behaviour.

According to the Islamic Penal System, true effect can only be given to individual and general deterrence if the general public witness the imposition of punishment so that the offender may be humiliated thereby. In order for potential offenders to be aware that punishment is a real possibility flowing from criminal action, such facts must pertinently be brought to their attention. One of the most effective ways of informing the public in this regard is either to impose punishment publicly, or to ensure that they are cogently made aware that punishment is imposed on offenders.

However, the public imposition of punishment, especially lapidation and lashes has evoked severe criticism in Western countries as being crude and barbaric. A further criticism is that it infringes the dignity of the offender and brutalises those who view it. It also does not accord with twentieth century standards, violates the public's sense of decency and value of human rights.

Despite the public imposition of punishment in Saudi Arabia, offences like murder, rape and adultery still occur. This is an indication that the penal objective of deterrence on its own cannot eradicate crime. Furthermore, it is not possible to calculate to what extent this element prevents the commission of offences.

Although rehabilitation is the underlying factor in the

imposition of punishment within the Islamic Penal System, its importance should not be over-emphasised at the expense of the other penal objectives. Reform also plays an important role in the Hereafter, since punishment may be reduced, or the offender may be pardoned by Allah if he repents after having committed the offence.

Great emphasis is placed on the protection of society by the *Shari'ah*, since it views the rights of individuals to be secondary to the rights of society. However, offenders can only be incarcerated once they have been convicted of a criminal offence, provided that they constitute a danger to society, they may be imprisoned pending the criminal trial. However, most offenders are summoned to appear in court. The phenomenon of bail is not found in the *Shari'ah* - an offender is either incarcerated if he constitutes a danger to society or is summoned to appear in court, if he is not. Such a system effectively eradicates the chances of offenders committing further offences once they are released on bail.

### **10.4 CAUSES OF CRIME**

The *Shari'ah* accepts that environmental factors have a marked influence on criminal behaviour, although many offenders commit crimes as a result of their character and personality, despite favourable environmental factors. These innate urges, over which there is no control by either society or the individual concerned, have a strong influence over criminal behaviour.

### **10.5 THE IMPORTANCE OF THE FAMILY UNIT**

Criminal laws of Islam are geared toward enhancing the lives of its adherents by resolving disputes through anticipatory mechanisms. The *Shari'ah* seeks to prevent deviance in the following ways:



- \* setting high moral standards;
- \* individuals are adequately warned of the punishment that awaits them in both this world and the Hereafter;
- \* believers are obliged to assist and guide each other on the side of obedience and righteousness;
- \* it outlaws crime "stimulants" like alcohol, drugs and illegal sexual activity; and
- \* young persons are urged to marry and the wealthy must financially assist the poor.

The *Shari'ah* balances and regulates the relationship between individuals and society. Although the individual is the main element of Islam's total scheme, the family is the core unit which acts as the support system; it has the highest status and enjoys the most prestige within the scheme. Furthermore, the family cannot survive other than within a social order, both being inter-dependant and in equilibrium.

Only a man and woman together can form a family from which procreation can occur. The family communicates values and culture, thus providing a stable environment to rear offspring. However, the family unit can only survive if the roles of its components are clearly defined and strictly followed. Therefore the *Shari'ah* views crimes against society or the family, as being against Allah Himself.

It is against this background that *Qisas* and *Hadd* must be viewed. Sexual relations can only occur between married partners within the family unit. Otherwise such activity will seriously impinge on the sanctity of the family structure. The right to polygamy is linked to sexual relations between married partners and acts as a safety valve for men qualifying (in terms of specific criteria determined by the *Shari'ah*) to take more than one wife.

The best vehicle to reform the offender is the family structure and not the four walls of a prison, where all the inmates are criminals. Furthermore, reform of the offender can only occur within society and for this reason the *Shari'ah* prescribes physical and pecuniary penalties in preference to incarceration.

Important principles highlighted by the *Shari'ah* are:

- \* The principle of criminal responsibility.
- \* The principle of the relationship between crime and punishment.
- \* The principle of non-retroactive penal laws.

### 10.6 THE CONCEPT OF PUNISHMENT WITHIN THE *SHARI'AH*

The *Shari'ah* makes a distinction between sins and crime; all crimes are sins but not all sins are crimes. Consequently offenders could be punished twice for offences they commit. Crimes are punishable in the mundane world, whilst sins are punishable in the Hereafter. Punishment in the Hereafter takes on a much more severe form than that imposed in the mundane world. However, offenders who truly repent can be pardoned in the Hereafter if Allah so wishes.

One of the main features of punishment in the Islamic Penal System is the rigidity with which it is imposed and preserved. *Hadd* is an inflexible category which completely removes the discretion from the judicial officer imposing punishment. Likewise *Qisas*, where the discretion to impose punishment lies with the victim or the heirs of the victim. Even *Ta'zeer* is rigid in the sense that all punishment imposed within this category must be imposed within the spirit and confines of the *Shari'ah*.

The main disadvantage of inflexibility is that it does not permit the penal system to grow and develop with changing times. People's values and sense of fairness changes with time; what was perceived to be heinous crimes in days gone by are later regarded as acceptable behaviour. This is not possible in the structure of the *Shari'ah*, for example, adultery, fornication, drinking wine, apostasy, etc., are still offences in Islamic Law.

### 10.7 ISLAMIC PENAL PHILOSOPHY

There is a strong link between the community and punishment. This can be gleaned from the following two factors: firstly, individuals are instructed by the *Shari'ah* to encourage good and beneficial acts and actively discourage their fellow human beings from committing criminal acts. Each individual bears a measure responsibility for those he comes into contact with, to encourage them to act in a benevolent manner.

Secondly, as the family or clan of the offender is responsible for paying the *Diyya* and *Kaffara*, they exert a strong influence on family or clan members to remain law-abiding. Thirdly, the importance of family honour has a significant effect on directing the behaviour of family members. The *paterfamilias* of the family exerts tremendous influence over family members to remain law-abiding in order to preserve their family honour.

Economic well-being and the moral upliftment of society has a major effect on the eradication of crime, whilst victim compensation plays an important role within the Islamic Penal System. The victim has an active role in the imposition of punishment in instances of physical assaults.

The *Shari'ah* recommends that punishment for serious offences should be harsh, but the period between its imposition and the implementation should be as short as possible, so as to eliminate any additional hardship suffered by the offender. Punishment

should be carried out swiftly, justly and fairly.

#### **10.8 CRIME INHIBITING MEASURES IN THE SHARI'AH**

There are three main crime inhibiting measures contained in the *Shari'ah*:

- \* Young persons are encouraged to marry in order that their sexual needs may be satisfied in a legitimate manner; in this way it is hoped that the incidence of sexual crimes will be diminished. However, it is common knowledge that many sexual offenders are either friends of, or related to their victims, thus this measure may have limited effect.
- \* Restrictions on mixing of persons of the opposite sex is another attempt at eradicating sexual crimes. A possible negative effect of this phenomenon could be an increase or promoting factor in homosexual behaviour in both males and females.
- \* Although the Islamic economic system aims at preventing crimes of a pecuniary nature by financially assisting indigent persons, many offenders commit these offences not out of need, but from an innate or irresistible urge to steal. Others may do so to increase their wealth.

#### **10.9 JUSTIFICATION FOR PUNISHMENT**

Although there is a school of thought promoting determinism, the generally accepted belief in Islam is that despite the fact that God knows before-hand the manner in which a person will respond to a specific situation, they are nevertheless responsible for their actions, since they are imbued with a sense of what is right and wrong, and have the ability to act accordingly.

Man is responsible for his actions after exercising the choice to do either good or bad. Consequently he is punished for committing crimes and rewarded for benevolent acts. Although God is aware of all the actions of human beings, he does not direct or interfere with their behaviour, thus they are answerable for their actions once they make a choice to act in a certain way.

### 10.10 ARBITRATION

Certain offenders can be diverted from the criminal justice system to a process of arbitration. This is only allowed for offences which are not within the *Hadd* or *Qisas* categories. Arbitrators are required to have the same qualifications as those of *Qadhis* and are entitled to impose penalties after arriving at a decision subsequent to hearing evidence.

This process has numerous advantages, for example, it eases the burden on the judicial system, thus allowing *Qadhis* to spend more time on serious offences; the less formal atmosphere is conducive to adjudication of juvenile offenders; postponement of cases is minimised, thus decreasing costs and trauma suffered by the offender; family and inter-spousal violence can be dealt with sympathetically and adequately at this forum; and it lessens the stigma suffered by the offender.

### 10.11 FORMS OF PUNISHMENT PERMITTED BY THE ISLAMIC PENAL SYSTEM

#### 10.11.1 EXECUTION

There are presently strong moves in Great Britain to re-introduce the death penalty, whilst in South Africa opinion polls indicate tremendous support for the lifting of the moratorium on the imposition of the death penalty. Although the Islamic Penal System distinctly mentions specific forms which this penalty can take (decapitation with a sword and crucifixion), it does not

prohibit any other method being employed.

An offender is crucified only after he has been executed; it actually serves as a means of publicising the punishment of the offender. The other major difference with the application of this form of punishment is that it takes place in public. Criticism from Western countries has not been directed so much against the utilisation of the death penalty, but the form it takes and the public imposition thereof. Significant amounts of criticism has been levelled against lapidation and decapitation. When imposing the death penalty the following penal objectives are satisfied: retribution, protection of society and deterrence.

The *Shari'ah* directs that this penalty should be imposed in the least painful manner possible. The death penalty cannot be abrogated or suspended in any way since it is prescribed in the *Quran*. Although there is no direct evidence linking the increase in capital offences to the moratorium on the death penalty in South Africa, statistics indicate that there was a marked increase in all types of crime over the last two years. Indications are that the moratorium will be lifted soon.

#### 10.11.2 DISMEMBERMENT

Dismemberment is criticised as being disproportionate to the seriousness of the crime for which it is imposed. It is severe in the sense that it is irreversible and has permanent negative consequences for the offender. Amputation will affect his livelihood and ability to secure employment. As such, it amounts to a permanent scar which amounts to punishment in perpetuity. The punishment becomes more severe when the crime of armed robbery is committed or when a second or third count of theft is committed.

If one examines the disproportionately low incidence of theft in Saudi Arabia in relation to its neighbouring States, it is an indication of the deterrent effect of amputation. However, it

could be questioned whether the means justified the end. The *Shari'ah* supports its position by stating that theft causes severe insecurity and diminished peace of mind of individuals. Since amputation is a *Hadd* punishment, it cannot be phased out or replaced as a penalty for theft.

### 10.11.3 LASHES

Lashes are imposed in public on both men and women. In practice the instrument used ranges from a cane to a leather strap. Whipping as it is imposed in terms of the *Shari'ah* has also been criticised in Western countries for its harshness and the publicity it is accorded. Most Western states have ceased the application of this form of punishment, mainly because it is brutal and indications of doubt concerning its deterrent effect. However, this penalty is widely used as a form of punishment for juveniles in South Africa, mainly because there are limited alternatives available. Research in England has indicated that lashes has limited individual and general deterrent effect.

### 10.11.4 IMPRISONMENT

Incarceration as a form of punishment differs significantly from that which is found in Western countries. It is also not utilised as often, and thus the prison population is negligible. The *Shari'ah* is of the view that imprisonment cannot rehabilitate an offender unless it resembles a residential dwelling, except of course that the offender's movement is restricted. Conjugal visits are allowed to both male and female prisoners. However, a problem could arise with regard to long-term prisoners in that the conjugal visits could result in numerous children having to be reared without the presence and financial assistance of the father.

The major reasons for the *Shari'ah's* lack of confidence in imprisonment as a form of punishment are:

- \* It breaks up the family unit and causes undue hardship on the family of the offender.
- \* If the offender was the breadwinner, his imprisonment could cause financial hardship on the family and tax the State's financial resources.
- \* Lack of control over members of the family resulting from the absence of the head of the family.
- \* It causes a heavy financial burden on the tax-payer.
- \* It has a negative effect on juvenile offenders.
- \* It leads to unnatural sexual practices.
- \* It is a breeding ground for criminals and could increase the incidence of recidivism.
- \* It has failed to prevent serious crimes.
- \* Its effectiveness in reducing crime is questionable.

#### 10.11.5 BANISHMENT

This form of punishment is also unknown in Western countries. It appears to be an unstructured form of punishment as no supervision is exercised over the offender, and neither does it satisfy any of the penal objectives. Being in a foreign place could cause anxiety and lead to the commission of further offences. In practice this form of punishment is not extensively utilised.

#### 10.11.6 FINES

Fines differ in concept from that found in Western countries in the following way: if the offender is rehabilitated the amount paid is returned to him, but if he does not reform, the amount is utilised for public welfare projects. This practise will prevent State authorities from viewing it as a form of revenue and extending its application disproportionate to its value as a deterrent. The property of the accused can also act as a substitute if he has insufficient funds to pay the fine.



### 10.11.7 COMPENSATION

The 1989 value of full *Diyya* in Saudi Arabia was 32 000 U.S.A. dollars. It can be claimed as an alternative punishment to the death penalty by the heirs of the murdered victim. In cases of assault it can be alternatively claimed by the victim, should he decide against retaliation. The purpose of *Diyya* is to off-set the financial loss caused by the offence, and in this way it is akin to a settlement of damages, thus obviating the need for a further civil suit.

*Diyya* must be paid by the offender within a period of three years after it is demanded. The family or clan of the offender have the ultimate responsibility for paying the *Diyya*. This position has the advantage that family members exercise a prohibitory effect on potentially errant members.

### 10.12 HADD PUNISHMENT

This rigid form of punishment is reserved for what the *Shari'ah* views to be serious offences. Neither the legislature, nor the court may increase or ameliorate prescribed punishment.

#### 10.12.1 ADULTERY AND FORNICATION (ZINA)

The *Shari'ah* views adultery as a source of further crime and that it breaks down the family structure. For this reason it prescribes one of the harshest penalties found in the *Shari'ah* when the offence is committed by a married person, namely, lapidation. This form of punishment has been widely criticised in Western countries, since not only is it a very harsh form of punishment, it is imposed for an offence which has been decriminalised in the non-Muslim world.

However, in practice this penalty is seldom imposed, mainly due to the restrictive evidentiary requirements for a conviction.

Thus this severe penalty in practical terms serves mainly as a deterrent. This view is enforced by the fact that although numerous rapes have occurred in Pakistan, lapidation has not been imposed due to inadequate evidence, instead, imprisonment has been imposed as an alternative. The eye-witness testimony of four male witnesses are required for the imposition of lapidation.

Fornication is also severely punished in that the minimum penalty is one hundred lashes imposed on both male and female offenders. This act is also not considered an offence in non-Muslim countries. Sodomy, even if committed between consenting adults, is punishable with either lapidation, one hundred lashes or life imprisonment, depending on the prevailing school of jurisprudence.

### 10.12.2 FALSE ACCUSATION (QADHF)

False accusation of adultery or legitimacy is punishable with eighty lashes in terms of the *Shari'ah*. This offence is also unknown in other penal systems. A further penalty is attached to this offence in that the accused becomes incompetent to give evidence in a court.

### 10.12.3 APOSTASY (IRTIDAD)

Although all the major *Sunni* schools of jurisprudence agree that the death penalty should be imposed for apostasy, no such penalty is prescribed in the *Quran*. In fact, the *Quran* only mentions punishment in the Hereafter. This is not a unique position since the *Quran* does mention other offences which are only punishable in the Hereafter. These offences are mostly of a spiritual or religious nature.

Thus the ruling of the Prophet should be seen in this light. Furthermore, the *Quran* expressly states that the adherence to a religion is a personal choice. This position is diametrically

opposed to prescribing the death penalty for apostasy. Another unique feature is that women are not executed for this offence, but are imprisoned till they repent. For all other *Hadd* offences, women suffer the same punishment as men, be it lashes or amputation.

The more acceptable position is that the death penalty is only prescribed for those apostates who thereafter act in a violent manner toward the Islamic State, an act amounting to treason. It could be argued that the *Sunnah* should be interpreted so as to reflect this position. Furthermore, Islam has a history of tolerance toward other religions, and by executing apostates it could be violating its relationship with other religions or countries.

### 10.12.4 CONSUMING WINE OR OTHER INTOXICANTS

The *Shari'ah* has criminalised this offence because it can lead to the commission of crimes like murder, assault, culpable homicide and other crimes of violence. It can also lead to the break-up of marriages and abuse of family members. This offence includes within its ambit, the abuse of drugs having a narcotic effect. Manufacturers, transporters, sellers and possessors of these prohibited substances are also punishable.

It is also the only offence for which a confession is not admissible. Alcoholics and drug addicts are not punished with the prescribed punishment but are treated for their addiction. Small amounts of the prohibited substance can be consumed legitimately during the treatment process in order that the offender may be weaned off the habit-forming drug. Once the offender is cured, he becomes fully liable to be punished with up to eighty lashes, inflicted in public.

### 10.12.5 THEFT (*SARIQAH*)

Before amputation can be imposed, certain requirements and

conditions have to be complied with, for example, there must not be poverty or a famine within the country in which it is to be applied. Other requirements that has to be complied with are the following:

- \* The stolen property must have been removed from the owners possession.
- \* The property must not be valued at less than the *Nisab* (R7,00).
- \* The victim must be the owner of the property.
- \* The stolen property must have been guarded or secured.

These requirements ensure that this offence is more akin to the act of breaking an entering than it is to theft. If any of these requirements are not met, amputation cannot be imposed, and instead only *Ta'zeer* penalties can be utilised. For a second offence the thief's other hand can be amputated and for a third or further like offence, either the left foot can be amputated or the offender can be sentenced to a long term of imprisonment.

This penalty of amputation for the offence of theft for is currently imposed in Iran, Saudi Arabia, Sudan and Pakistan. A major criticism of this penalty is its irreversibility and brutal nature. Imam Abu Haneefa went as far as to recommend that instead *Ta'zeer* punishment be imposed. There is, however, scant doubt that this severe form of punishment has significantly curtailed its incidence in Saudi Arabia.

### 10.12.6 ARMED ROBBERY (*AL-HIRABAH*)

Armed robbery is punishable with some of the harshest penalties found in the *Shari'ah*, namely, amputation of the hand and foot on opposite sides, exile, beheading with a sword and crucifixion. However, to date, last-mentioned punishment has not been imposed in an Islamic State. Crucifixion is intended to be carried out after the accused is executed.

Exile is imposed if only threats of safety occur, whilst if only theft occurs during the act, the hand and foot of opposite limbs are amputated; if only killing and no theft occurs, then the offender is executed with a sword; and if both theft and killing occurs, execution and crucifixion is imposed.

### 10.12.7 DESERTING THE BATTLEFIELD IN JIHAD

This offence is unique to the Islamic Penal System since *Jihad* is only to be found in the *Shari'ah*. It is a specific type of battle or war which is embarked upon in order to defend or protect an Islamic State when it is threatened. The death penalty is imposed for this offence.

### 10.13 QISAS PUNISHMENT

*Qisas* is prescribed for homicide and assault and is based on the principle of "an eye for an eye...". It was introduced in order to eradicate revenge killing which was rife in pre-Islamic days. Heirs of the victim have a direct influence on the punishment to be imposed in a case of murder and have the choice of either demanding that the accused be killed in the same manner that the victim was murdered or that the accused pay full *Diyya*. The heir has the further choice of forgoing the punishment and payment of the *Diyya* and forgive the offender.

However, the *Qadhi* retains the right to punish the offender for the infringement of the rights of society. In practice periods of imprisonment (*Ta'zeer* punishment) are imposed on the offender in addition to the *Diyya*, or on its own where no *Diyya* or retaliatory punishment has been demanded. This period of imprisonment entails a minimum of between one and five years in Muslim countries; the death penalty cannot be imposed in its stead.

Payment of the *Diyya* can render a civil suit for damages

unnecessary. Although the heirs make the choice, the punishment is carried out by the State authorities, who are also responsible for collecting the *Diyya* from the offender. Ultimate responsibility for this payment rests with the family or clan of the offender if he is not at the means to pay it.

Culpable homicide is punishable with payment of an amount equal to the full *Diyya* (the 1989 equivalent was 32 000 U.S.A. dollars). This punishment cannot be substituted by any other penalty, neither can any *Ta'zeer* punishment be imposed in addition to it.

The percentage of the *Diyya* that has to be paid for physical assaults has been pre-determined by the *Shari'ah*, for example, the full amount for the destruction of both eyes and internal injuries it is a third of the full *Diyya*, etc. Victims can also demand that the same injury inflicted by the offender be brought to bear on him. The *Qadhi* retains the right to impose *Ta'zeer* punishment on the offender, in addition to the *Diyya*, to cater for the interests of society.

It is highly recommended by the *Shari'ah*, that in the case of both murder and assault, the victim or the heir choose payment of *Diyya* instead of demanding that retaliation be imposed. In fact, such choice is rewarded in the hereafter.

### 10.14 TA'ZEER PUNISHMENT

Because of the rigid nature of the previous two categories of punishment, *Ta'zeer* was established to cater for those offences which were either not criminalised or where no punishment had been prescribed for it. Acts which are immoral or irreligious can also be criminalised under this category.

Lapidation and dismemberment cannot be imposed, although for serious offences the death penalty is a competent sentence, for

example, spying, drug smuggling, etc. There is a general rule in the *Shari'ah*, that the limits of *Hadd* punishment cannot be exceeded by *Ta'zeer* punishment.

If the required four witnesses corroborate each other in a case of rape, then lapidation will be imposed if either the victim or offender were married; if both were unmarried then one hundred lashes will be imposed. In cases of fornication the evidence of two witnesses are required. Should the required restrictive evidence not be forthcoming, then only *Ta'zeer* punishment can be imposed, provided that it can also take the form of the death penalty.

### 10.15 PENAL SYSTEMS OPERATING IN MUSLIM COUNTRIES

There are currently only two countries where the complete Islamic Penal System applies, namely, Iran and Saudi Arabia. Afghanistan and Pakistan are in the process of Islamizing their respective legal and penal systems. There are also numerous other Muslim countries which apply the Islamic Penal System to varying degrees, for example, Sudan, Bahrain, Kuwait, Yemen, Egypt and Malaysia.

As a result of the world-wide move toward Islamic Fundamentalism in Muslim countries, it is expected that there will be increasing moves toward introducing the *Shari'ah* into the legal systems of countries where the population is predominantly Muslim. This is evident in the following countries: Algeria, Turkey, Jordan, Lebanon, Morocco, Tunisia, Egypt, Malaysia, Libya and the Islamic states in the Russian federation.

The civil law of the *Shari'ah* currently has much wider application in the legal systems of Muslim countries than the criminal laws, for the following reasons: the Islamic Penal System can only be applied in countries where the *Shari'ah* applies in its totality; the penalties contained therein are too

harsh by modern-day standards; non-Muslims residing in the Islamic State have serious objections to being subject to the harsh penalties of this system; and the rigidity of the system does not allow for the flexibility required by changing times.



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## GLOSSARY OF ARABIC TERMS

Ahadith	Plural of <i>Hadeeth</i>
Allah	God
Baghi	Rebellion
Barzakh	Purgatory
Bayyina	Rules of evidence
Beit ul-Mal	Public Treasury
Bid'a	Adoption of a foreign custom into Islam
Caliph	Religious and secular leader of the Islamic State
Darul-Kuza	Judicial Dept. of the Islamic State
Dhimmi	Non-Muslim afforded protection in the Islamic State
Diyya	Blood-money
Emir	Islamic ruler
Fard	Obligatory
Fatwa	Legal decision made by a <i>Mufti</i>
Fiqh	The science of the <i>Shari'ah</i>
Iqrar	Admissions
Habs	Imprisonment
Hadd	Fixed punishment for certain crimes
Hadeeth	Ruling of the Prophet
Hakam	Arbitrator
Hajj	Pilgrimage to Mecca
Hanafi	<i>Sunni</i> School founded by Abu Haneefa
Hanbali	<i>Sunni</i> School founded by Agmad ibn Hanbal
Haram	Forbidden
Hudood	Plural of <i>Hadd</i>
Hukuma	Penalty for certain wounds
Ijmaa	Consensus of jurists
Ijtihad	Individual reasoning
Irtidad	Apostasy
Islam	Submission to the will of Allah

## GLOSSARY OF ARABIC TERMS

<i>Istehsan</i>	Preference of indications on grounds of public policy
<i>Jihad</i>	Holy war against non-believers
<i>Jinayat</i>	Delict
<i>Kabirah</i>	Major sins
<i>Kaffara</i>	Religious expiation
<i>Khamr</i>	Wine
<i>Li'an</i>	Husband's false accusation of his wife's adultery
<i>Makruh</i>	Disapproved act
<i>Maliki</i>	<i>Sunni</i> School founded by Malik ibn Anas
<i>Mandub</i>	Meritorious act
<i>Mazalim</i>	Secular court settling disputes of a penal nature
<i>Mubah</i>	An act of indifferent consequence
<i>Mufti</i>	Specialist in religious law
<i>Mujtahidoon</i>	Persons entitled to interpret the <i>Quran</i>
<i>Murtadd</i>	Apostate
<i>Muslim</i>	Follower of the religion of Islam
<i>Nisab</i>	Least amount of property considered to have value
<i>Qadhf</i>	False accusation
<i>Qadhi</i>	Islamic judge
<i>Qat al-Tariq</i>	Armed robbery
<i>Qatl al-amd</i>	Murder
<i>Qatl al-khata</i>	Homicide by misadventure
<i>Qatl bi-sahab</i>	Homicide by intermediate cause
<i>Qatl shibhul-and</i>	Voluntary manslaughter
<i>Qisas</i>	Retaliation/Equality
<i>Qiyas</i>	Analogy
<i>Quran</i>	Holy book of Islam
<i>Ra'i</i>	Opinion of scholars interpreting the <i>Quran</i>
<i>Rajm</i>	Lapidation
<i>Riba</i>	Usury



## GLOSSARY OF ARABIC TERMS

<i>Ridda</i>	Apostasy
<i>Saghira</i>	Minor sins
<i>Saraqah</i>	Theft
<i>Shafi'i</i>	<i>Sunni</i> school founded by Imam Shafi'i
<i>Shari'ah</i>	Sacred law of Islam
<i>Shi'a</i>	Group of Muslims upholding the right of Ali and his successors to the leadership of the Muslim community
<i>Shirk</i>	Associating another being with Allah
<i>Siyasa</i>	Administrative justice
<i>Sulh</i>	Settlement
<i>Sunnah</i>	Normative legal custom, particularly rulings of the Prophet
<i>Sunni</i>	Main branch of Muslim followers
<i>Surah</i>	Chapter in the <i>Quran</i>
<i>Taubah</i>	Repentance
<i>Ta'zeer</i>	Discretionary punishment
<i>Ulema</i>	Body of Muslim scholars
<i>Umma</i>	Community
<i>Uqubat</i>	Penal laws
<i>Usul al-fiqh</i>	Foundations of jurisprudence
<i>Zakaat</i>	Compulsory tax on Muslims (2,5%)
<i>Zina</i>	Unlawful sexual intercourse